Montana Law Review

Volume 33
Issue 2 *Summer 1972*

Article 2

7-1-1972

Participation by Off-Reservation Indians in Programs of the Bureau of Indian Affairs and the Indian Health Service

Lee J. Sclar

PARTICIPATION BY OFF-RESERVATION INDIANS IN PROGRAMS OF THE BUREAU OF INDIAN AFFAIRS AND THE INDIAN HEALTH SERVICE

by Lee J. Sclar*

A widely held misconception is that neither the Bureau of Indian Affairs (B.I.A.) nor the Indian Health Service (I.H.S.) do or may serve off-reservation Indians. This article documents that B.I.A. and I.H.S. do serve off-reservation Indians, that such service is legal, and that off-reservation Indians have as great a moral claim to such service as reservation Indians.

DEMOGRAPHIC BACKGROUND

In 1950 over 50 percent of all Indians[1] lived on reservations.[2] A

*B.B.A., 1963, University of Michigan; J.D., 1966, University of California at Berkeley. Acting Director, California Indian Legal Services (C.I.L.S.).

Three C.I.L.S. law clerks assisted in the preparation of this paper. Lois Meltzer read Volume II of KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES (1904) and compiled a list of the Government's current Indian treaty obligations which are unrelated to land. Barbara Bourhis and Kathy Dashiell spent many hours on the phone attempting, usually without success, to gather data on the extent of B.I.A. and I.H.S. services to off-reservation Indians. Valuable comments on a prior, unpublished version of this paper were made by Lindsay Brew, Director of Papago Legal Services; George Duke, former director of C.I.L.S.; and Jack Forbes, Professor of Anthropology and Applied Behavioral Sciences, University of California at Davis.

[1]As used in this paper the term "Indian" includes all Alaska Natives and is not restricted to persons of one fourth or more Indian blood.

A quarter blood definition is often used by the Bureau of Indian Affairs in determining who is eligible for its services. *E.g.* U.S. Dept. of the Interior, Bureau of Indian Affairs, Statistical Division, Estimates of the Indian Population Served By The Bureau of Indian Affairs: March 1971 (July 1971) [hereinafter cited as B.I.A. Service Population Report] (Appendix A). Such a quarter-blood restriction by the B.I.A. is legal in some circumstances. 25 U.S.C. §§480 and 482. In other circumstances, however, it is illegal. For instance, B.I.A. educational services are limited to quarter bloods only in states which provide Indian children with "adequate free school facilities." 25 U.S.C. §297. Many Indians rightly believe that few if any states provide free school facilities that are adequate to meet the educational needs of Indian children. *See,* SENATE COMM. ON LABOR AND PUBLIC WELFARE, INDIAN EDUCATION: A NATIONAL TRAGEDY—A NATIONAL CHALLENGE, *S.Rep.* No. 91-401, 91st Cong., 1st Sess. (1969). For purposes of the INDIAN REORGANIZATION ACT (25 U.S.C. §§461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479) Indians are (1) persons of Indian descent who are members of an Indian tribe that was under federal jurisdiction on June 18, 1934, (2) descendants of such members who were, on June 1, 1934, residing within an Indian reservation, and (3) persons of one-half or more Indian blood. 25 U.S.C. §479; and *see,* 25 U.S.C. §§473a, 504.

The census definition of Indian has varied. In 1950 Indians included full blooded Indians, persons of mixed white and Indian blood who were enrolled on an Indian reservation or agency roll, persons of one-fourth or more Indian blood, and persons of any Indian blood who were regarded as Indians in the community where they lived. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, UNITED STATES CENSUS OF POPULATION: 1950, SPECIAL REPORT P-E, No. 3B at 3B-4 (1953) [hereinafter cited as 1950 Census]. (Special Report P-E, No. 3B was issued as a preprint of Vol. IV, Part 3, Chapter B, which was never published.) The 1960 definition of Indian was the same as for 1950 except that persons of one-fourth or more Indian blood ceased to be a category. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS,

similar percentage resided on reservations in 1960.[3] By 1970 only 39 percent of all Indians were reservation residents.[4]

U.S. CENSUS OF POPULATION: 1960, SUBJECT REPORTS; Vol. II, Series PC(2)-1C at X (1963) [hereinafter cited as 1960 Census]. In 1970 the definition was revised again. A person was counted as an Indian in the 1970 census on the basis of a race question on the Census form. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION, FINAL REPORTS PC(1)-B2-PC(1)-B52, Appendix B at App. 8 (1971) [hereinafter cited as 1970 Census]. In the case of self-enumeration a person had to identify himself as an Indian. Where an enumerator completed the form during a household interview, he asked a person's race, judged by appearances, or relied on local knowledge, as he saw fit. U.S. DEPT. OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, STATISTICS DIVISION, INDIAN POPULATION, 1970 CENSUS—STATES, COUNTIES, AND PLACES (1971). "[I]n rural areas and small towns distant from reservations, persons who considered themselves Indian may have been classified otherwise by enumerators." *Id.*

In neither 1950, 1960, nor 1970 were Eskimos or Aleuts counted as Indians. 1950 CENSUS, SPECIAL REPORT P-E, No. 3B at 3B-4; 1950 CENSUS, Vol. II, Part 51 at 51-V, 51-13; 1960 CENSUS, Vol. II, Series PC(2)-1C at X; 1970 CENSUS, FINAL REPORT, Series PC(1)-B, Appendix B, App.-8.

[2]The total Indian population exclusive of Eskimos and Aleuts but including Indians in Alaska (which was then a territory) was approximately 357,000. 1950 CENSUS, Vol. II, Part 1 at 1-106; 1950 CENSUS, Vol. II, Part 51 at 51-13. The number of Eskimos and Aleuts in Alaska (the only area for which published data is available) was approximately 20,000. 1950 CENSUS, Vol. II, Part 51 at 51-13.

Indians living in "Indian Agency Areas" of 2500 or more numbered about 247,000. *Id.* at 3B-61, 3B-62. That 247,000 included 52,000 Indians in Oklahoma where there were no reservations. *Id.* at 3B-6-3B-7, 3B-61-3B-62. Subtracting the Oklahoma Indians leaves 195,000 as roughly the number of Indians living on reservations in 1950. That number is somewhat inaccurate because it does not include Alaska reservations, state reservations, or Indian agencies with less than 2500 people and it sometimes includes Indians who lived off reservations in counties with reservations. *Id.* at 3B-6. Use of the 195,000 figure is necessary, because it is the only even rough approximation available.

In summary then, the total Indian population in 1950 was approximately 377,000. Roughly 195,000 were reservation Indians; 183,000 were off-reservation; and the percentage of reservation Indians was 51.7.

[3]The Indian population, not counting Eskimos and Aleuts, was approximately 524,000. 1960 CENSUS, Vol. I, Part 1 at 1-144. The Eskimo and Aleut population in Alaska (the only state for which published data is available) was approximately 28,000. 1960 CENSUS, Vol. II, Series PC(2)-1C at 252.

The number of Indians living on reservations in 1960 is not known with certainty. The Census did not publish data on reservation residence. It did not even publish statistics on Indian Agency Areas, as it had for 1950. *Supra* note 2, B.I.A. testimony to Congress states, however, that the 1960 Census showed "approximately 360,000 Indians living on reservations." HEARINGS ON H.R. 10802 BEFORE THE SENATE COMMITTEE ON APPROPRIATIONS, 87th Cong., 2d Sess. at 83 (1963).

The 360,000 reservation Indians reported by the B.I.A. almost certainly include Indians living in former reservation areas of Oklahoma. U.S. DEPT. OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, U.S. INDIAN POPULATION (1962) and LAND (1963) at 2 1963; *Supra* note 2, and notes 4 and 22, *infra.* Of the nearly 65,000 Oklahoma Indians in 1960 (1960 CENSUS, Vol. 1, Part 38 at 38-31), probably about 57,000 were residing in former reservation areas. That estimate is based on a 1950 ratio of 52,000 in former reservation areas (*supra* note 2) to a total of 54,000 (1950 CENSUS, SPECIAL REPORT P-E, No. 3B at 3B-61) and a 1970 ratio of 76,000 in former reservation areas (*infra* note 4) to a total of 98,000 (*infra* note 4). It agrees with a B.I.A. report that 57,543 Indians resided in former Oklahoma reservation areas in 1962. U.S. DEPT. OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, U.S. INDIAN POPULATION (1962) and LAND (1963), *supra* at 6. Subtracting the 57,000 off-reservation Oklahoma Indians erroneously included in the 360,000 figure yields a 1960 reservation population of 303,000.

To summarize, the total Indian population in 1960 (not counting Eskimos and Aleuts outside of Alaska) was 552,000, and the reservation population was roughly 303,000 or 54.9 percent of the total.

"The 1970 Census reports 795,730 Indians. 1970 CENSUS, FINAL REPORTS PC(1)-B2-PC(1)-B52, Table 17. The 1970 Eskimo and Aleut population in Alaska was estimated to be 35,252. U.S. DEPT. OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, STATISTICS DIVISION, PRELIMINARY 1970 CENSUS COUNTS OF AMERICA INDIANS AND ALASKA NATIVES (March 1971). 827,982 is quite possibly an undercount of the total Indian population, though. For example, Census Bureau data purport to show that the Indian population of Lake County, California, fell from 433 in 1960 to 323 in 1970 while the total county population rose from 13,786 to 19,548. 1960 CENSUS, Vol. 1, Part 6 at 6-196; 1970 CENSUS, FINAL REPORT PC(1)-B6 at 6-310. By contrast, 523 Lake County residents applied to the B.I.A. in 1969 for a share of the California Indian claims award. Unpublished data supplied by Sacramento Area Office, B.I.A. *See also* the last sentence of the third paragraph of footnote 1 and the percentages for Arizona and New Mexico in the table in note 5 *infra*.

The 1970 Census is, however, the only count of all on and off-reservation Indians. As supplemented by the B.I.A.'s estimate of Eskimos and Aleuts in Alaska, the 1970 Census shows the following Indian population in each state:

Alabama	2,443	Montana	27,130
Alaska	51,528	Nebraska	6,624
Arizona	95,812	Nevada	7,933
Arkansas	2,014	New Hampshire	361
California	91,018	New Jersey	4,706
Colorado	8,836	New Mexico	72,788
Connecticut	2,222	New York	28,355
Delaware	656	North Carolina	44,406
District of Columbia	956	North Dakota	14,369
Florida	6,677	Ohio	6,654
Georgia	2,347	Oklahoma	98,468
Hawaii	1,126	Oregon	13,510
Idaho	6,687	Pennsylvania	5,533
Illinois	11,413	Rhode Island	1,390
Indiana	3,887	South Carolina	2,241
Iowa	2,992	South Dakota	32,365
Kansas	8,672	Tennessee	2,276
Kentucky	1,531	Texas	17,957
Louisiana	5,294	Utah	11,273
Maine	2,195	Vermont	229
Maryland	4,239	Virginia	4,853
Massachusetts	4,475	Washington	33,386
Michigan	16,854	West Virginia	751
Minnesota	23,128	Wisconsin	18,924
Mississippi	4,113	Wyoming	4,980
Missouri	5,405		
		TOTAL	827,982

1970 Census data showing Indians by reservation are not yet available. The best available contemporaneous report on reservation Indian population was compiled by the B.I.A. in March, 1970. HEARINGS ON H.R. 9417 BEFORE THE SENATE COMMITTEE ON APPROPRIATIONS, 92d Cong., 1st Sess., pt. 1 at 752-753 (1971) [hereinafter cited as Senate Hearings]. (For a more detailed version of that report, *see*, HEARINGS ON H.R. 9417 BEFORE A SUBCOMMITTEE OF THE HOUSE OF REPRESENTATIVES COMMITTEE ON APPROPRIATIONS, 92d Cong., 1st Sess., pt. 2 at 1087-1092 (1971) [hereinafter cited as House Hearings].) The B.I.A. report appears at first glance to show 382,875 Indians lived on reservations in 1970. Included in the 382,875, however, were 76,025 Oklahoma Indians who were living on former reservations (*see, infra* note 22); and excluded were Indians on Alaska reservations. Why Alaska reservations were excluded from the B.I.A. report is not clear. In 1969, the latest year for which published figures are available, Alaska reservations had 2,778 Indian residents. U.S. DEPT. OF COMMERCE, FEDERAL AND STATE INDIAN RESERVATIONS: AN E.D.A. HANDBOOK (1971). An additional error of unknown magnitude involves the Navajo Reservation. All Indians residing within the B.I.A.'s Navajo service area are considered by the B.I.A. to live on the reservation even when in fact they do not. Senate Hearings pt. 1 at 753.

The Indian population on state reservations was 10,849 in 1969, once again the latest year for which published statistics are available. FEDERAL AND STATE INDIAN RESERVATIONS: AN E.D.A. HANDBOOK, *supra*.

Thus, the best estimate of the 1970 reservation Indian population is 320,500. This was 38.7 percent of the total 1970 Indian population of 828,000.

Of 1970's reservation Indians, 97 percent lived on federal reservations.[5] The remainder lived on state reservations in six eastern and southern states.[6]

How many off-reservation Indians were rural residents in 1970 and how many were urban cannot be determined from the data presently available.[7] In 1960 approximately 43 percent of off-reservation Indians

---

[5]309,628 of 320,500 reservation Indians live on federal reservations. *See supra* note 4 and the table below. The totals by state in the table are from the B.I.A. report of March, 1970 in Senate Hearings, pt. 1, at 752-753, except for Oklahoma, which is not included, and Alaska.

1970 INDIAN POPULATION OF FEDERAL RESERVATIONS

State	Reservation Population	Reservation Population As A Percent of 1970 Census Indian Population for Entire State
Alaska	2,778	5
Arizona	104,499	134
California	5,677	6
Colorado	1,553	18
Florida	1,070	16
Idaho	4,264	64
Iowa	435	15
Kansas	299	3
Louisiana	118	2
Michigan	866	5
Minnesota	9,636	42
Mississippi	1,530	37
Montana	21,448	79
Nebraska	2,407	36
Nevada	4,766	52
New Mexico	76,559	105
North Carolina	4,766	11
North Dakota	10,018	70
Oregon	2,315	17
South Dakota	28,584	88
Utah	5,900	52
Washington	12,098	36
Wisconsin	4,953	26
Wyoming	3,703	74
TOTAL OF STATES WITH FEDERAL RESERVATIONS	309,628	51

[6]*See, Supra* notes 4 and 5. The totals by state which follow are from FEDERAL AND STATE RESERVATIONS: AN E.D.A. HANDBOOK, *supra* note 4.

1969 INDIAN POPULATION OF STATE RESERVATIONS

State	Reservation Population	Percent of 1970 Indian Census Population for Entire State
Connecticutt	35	2
Maine	963	44
New York	8,983	32
South Carolina	47	21
Texas	728	4
Virginia	93	2
TOTAL	10,849	19

[7]As used in this section of this paper the terms rural and urban have the meanings assigned to them by the United States Bureau of the Census. Those meanings were almost the same in both 1969 and 1970. With certain minor exceptions, urban meant (a) a central city or twin cities with a population of at least 50,000, (b) closely settled territory surrounding such a central city or cities, and (c) any other incor-

lived in rural areas and 57 percent in urban.[8] That is, 19 percent of all Indians were off-reservation rural and 26 percent were off-reservation urban. If the ratio of rural to urban off-reservation Indians were the same in 1970 as in 1960, then 26 percent of all Indians would have been off-reservation rural in 1970 and 35 percent of all Indians would have been off-reservation urban. In all likelihood, the 1970 urban percentage was even higher.[9]

---

porated or unincorporated city, town or place with 2,500 or more inhabitants. 1960 CENSUS, Vol. 1, Part A at XVIII-XIX; 1970 CENSUS, FINAL REPORTS, PC(1)-B2-PC(1)-B52, Appendix A. Rural was everything else. 1960 CENSUS, Vol. 1, Part A at XVIII-XIX; 1970 CENSUS, FINAL REPORTS, PC(1)-B2-PC(1)-B52, Appendix A.

The census definitions of rural and urban are certainly not universal. In large states with many cities in excess of 50,000, cities which have 10,000 residents and are not suburbs to cities of 50,000 or more are often looked upon as rural, at least by residents of large metropolitan areas. Even a city of 40,000 or 50,000 is sometimes considered rural if it is the center for a farming area.

"The term 'urban Indians' is frequently used to mean Indians living in metropolitan centers." Senate Hearings, pt. 1, at 756.

[8]The total off-reservation Indian population was 249,000. *Supra* note 3. The off-reservation rural population was 106,000. U.S. DEPT. OF AGRICULTURE, ECONOMIC RESEARCH SERVICE, RURAL INDIAN AMERICANS IN POVERTY (Agricultural Economic Report No. 167) 22 (1969). The remaining 143,000 Indians—57 percent—were urban.

[9]The table below shows that between 1960 and 1970 approximately 15 percent of the Indian population shifted from rural areas to large central cities and their suburbs.

INDIAN POPULATION BY SIZE OF PLACE OF RESIDENCE

	1960		1970	
	Number	%	Number	%
Total	551,655	100	827,982	100
Urban	147,525	26.7	360,229	43.5
Urbanized Areas	84,630	15.3	241,699	29.2
Central Cities	64,178	11.6	158,115	19.1
Urban Fringe	20,452	3.7	83,584	10.1
Other Urban	62,895	11.4	118,530	14.3
Places of 10,000 or More	29,548	5.4	58,544	7.1
Places of 2,500 to 10,000	33,347	6.0	59,986	7.2
Rural	404,130	73.3	467,753	56.5
Places of 1,000 to 2,500	28,241	5.1	46,900	5.7
Other Rural	375,889	68.2	420,853	50.8

The terminology used in the chart is the Census'. Basically, "urbanized areas" were central cities with 50,000 or more inhabitants and those cities' suburbs; "other urban" was other cities and towns of 2,500 or more inhabitants; and "rural" was places of less than 2,500 people outside the suburbs; *Supra,* note 7.

The numbers used in the table were computed in the following manner. The Census reports Indian population, not including Eskimos and Aleuts, by size of place of residence. 1960 CENSUS, Vol. I, Part 1 at 1-144; 1970 CENSUS, FINAL REPORTS, PC(1)-B2-PC(1)-B52, Table 17. To those figures were added data on the Eskimo and Aleut population in Alaska, the state where the great majority of Eskimos and Aleuts live and the only state for which Eskimo and Aleut data is available.

The Eskimo and Aleut data is of necessity an approximation, albeit a good one. The Census reports Eskimos and Aleuts in the racial category "Other" for most purposes. 1960 CENSUS, Vol. II, Series PC(2)-1C at X; 1970 CENSUS, FINAL REPORTS, Series PC(1)-B, Appendix B, App-8. Only a numerical count of Eskimos and Aleuts in Alaska is reported. 1960 CENSUS, Vol. II, Series PC(2)-1C at 252; U.S. DEPT. OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, STATISTICS DIVISION, PRELIMINARY 1970 CENSUS COUNTS OF AMERICAN INDIANS AND ALASKA NATIVES (March 1971). In Alaska, however, virtually all "others" are Eskimos and Aleuts. (*compare* 1960 CENSUS, Vol. II, Series PC(2)-1C at 252 (28,078 Eskimos and Aleuts) with 1960 CENSUS, Vol. I, Part 3 at 3-17 (28,637 "others"), and *compare* U.S. DEPT. OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS STATISTICS DIVISION, PRELIMINARY 1970 CENSUS COUNTS OF AMERICAN INDIANS AND ALASKA NATIVES, *supra* (35,252 Eskimos and Aleuts) with 1970 CENSUS, FINAL REPORT PC(1)-B3 at 3-32 (35,786 "others"). Therefore, the distribution of Eskimos and Aleuts by size of place of residence was

INDIANS PRESENTLY RECEIVING B.I.A. AND I.H.S. SERVICES

The number of Indians receiving B.I.A. and I.H.S. services is extremely difficult to ascertain. Partly this reflects a failure to publish or even keep statistics.[10] Mainly, though, the lack of data results from ambiguity[11] and inconsistency[12] in defining who is eligible. What follows in this section portrays who the B.I.A. and I.H.S. are actually serving. The legality of those practices is considered below.

THE BUREAU OF INDIAN AFFAIRS

No fewer than five classes of Indians receive B.I.A. services: (1) Indians who reside on federal reservations,[13] (2) Indians who reside near reservations,[14] (3) Indians who reside on former Oklahoma reservations,[15] (4) Indians who are beneficial owners of trust property,[16] and (5) urban Indians.[17]

---

obtained by multiplying the total "other" population in each size of place of residence category by a ratio of the number of Eskimos and Aleuts to the total "other" population.

[10]LANGONE, A STATISTICAL PROFILE OF THE INDIAN: THE LACK OF NUMBERS IN TOWARD ECONOMIC DEVELOPMENT FOR NATIVE AMERICAN COMMUNITIES, A Compendium of Papers Submitted to the Subcommittee on Economy in Government of the Joint Economic Committee, Congress of the United States, 91st Cong., 1st Sess. (Comm. Print 1969) at Vol. I, p. 1.

[11]The B.I.A. sometimes considers itself responsible for Indians who live near, as well as on, reservations. Remarks of B.I.A. Commissioner Louis Bruce, Senate Hearings pt. 1 at 751. Yet, the B.I.A. has no uniform interpretation of "near a reservation." See the remarks of Commissioner Bruce, *id.* and House Hearings, pt. 2 at 1096-1097; B.I.A. SERVICE POPULATION REPORT, Appendix A, *infra;* Supplementary Affidavit of Wesley L. Barker of January 12, 1970 in *United Tribes of Mendocino County v. Bureau of Indian Affairs*, Civil No. 52326, (N.D. Cal.) [hereinafter cited as Barker Affidavit] (Appendix B).

[12]Compare memorandum of January 16, 1970 to Commissioner, Bureau of Indian Affairs from Assistant Secretary—Public Land Management [Harrison Loesch] stating that only reservation Indians are eligible for B.I.A. services (Appendix C) [hereinafter cited as Loesch Memorandum] with the testimony of B.I.A. Commissioner Bruce (Senate Hearings, pt. 1 at 751 and House Hearings, pt. 2 at 1140) that the B.I.A. serves Indians on or near reservations, and compare both with the testimony of Commissioner Bruce that the population served is controlled by Title 18 of the UNITED STATES CODE (House Hearings, pt. 2 at 1095).

[13]Testimony of B.I.A. Commissioner Bruce, Senate Hearings, pt. 1 at 751-753; Letter from Commissioner Bruce cited in remarks of Representative Sidney Yates, House Hearings, pt. 2 at 1140.

[14]Testimony of B.I.A. Commissioner Bruce, Senate Hearings, pt. 1 at 751; B.I.A. Appropriation Justification Statement, Senate Hearings, pt. 1 at 797; Letter from Commissioner Bruce cited in remarks of Representative Sidney Yates, House Hearings, pt. 2 at 1140; B.I.A. SERVICE POPULATION REPORT, Appendix A, *infra.*

[15]Information supplied by B.I.A., Senate Hearings, pt. 1 at 752-753; B.I.A. SERVICE POPULATION REPORT, Appendix A, *infra.*

[16]Testimony of B.I.A. Commissioner Bruce, Senate Hearings, pt. 1 at 755.

[17]Testimony of B.I.A. Commissioner Bruce, Senate Hearings, pt. 1 at 754-755; Testimony of Philip Acker, Chief, Division of Employment Assistance, B.I.A., Senate Hearings, pt. 1 at 760; B.I.A. Appropriation Justification Statement, Senate Hearings, pt. 1 at 799; Testimony submitted subsequent to hearing by Ernest Stevens, Director of Community Services, B.I.A., Senate Hearings, pt. 1 at 937; Testimony of Commissioner Bruce, House Hearings, pt. 2 at 1096; Letter from Philip Acker in remarks of Congressman Sidney Yates, House Hearings, pt. 2 at 1140; Rural Housing Alliance, Low-Income Housing Bulletin, No. 70-11 at p. 2 (November 1970).

Schr: Participation by Off-Reservation Indians

Approximately 310,000 Indians reside on federal reservations.[18] As a class they receive the full range of B.I.A. services, including trust property management, law and order, education, housing, and welfare. Not every Indian receives all of those services, however. A particular individual may not apply or may be incligible for certain programs.[19] Moreover, at least one program—general assistance welfare—is not available on all reservations.[20]

Nearly 95,000 Indians reside near reservations according to the latest data supplied to Congress by the B.I.A.[21] Included in that number are 5,204 Indians living in former reservation areas of Oklahoma[22] and all Indians[23] in Alaska.[24] Excluded are all but 1,307[25] California Indians.

The inclusion of the Oklahoma Indians is surprising, because according to the B.I.A., Oklahoma has no reservations to live near.[26] Moreover, no basis is apparent for regarding some residents (5,204) of former Oklahoma reservations as living near reservations while most residents of former reservations (76,025)[27] are treated as living on reservations.

The Alaska and California situations provide an interesting contrast. All Alaska Indians are considered to live near a reservation no matter where in the state they live[28] although Alaska has only five reservations[29] and is a bigger state than California.[30] On the other hand only 1,307 of California's roughly 35,000 native, off-reservation Indians[31]

[18]*See supra* notes 4 and 5.

[19]Information supplied by B.I.A., Senate Hearings, pt. 1 at 753.

[20]Testimony of Charles Rovin, Chief, Division of Social Services, B.I.A., House Hearings, pt. 2 at 1175; R. Wolf, *Needed: A System of Income Maintenance for Indians*, 10 ARIZ. L. REV. 596, 608-609 (1968).

[21]Senate Hearings, pt. 1 at 753. The exact total given was 94,583.

[22]*Id.* The characterization of certain lands as "former reservations" is the B.I.A.'s. *Id.* The validity of that characterization is beyond the scope of this paper, but not beyond question. *See* UNITED STATES DEPARTMENT OF THE INTERIOR, FEDERAL INDIAN LAW 985-1049, especially 998 (1958); Remarks of Congressman Edmondson, 102 CONG. REC. 15188 (July 27, 1956). Even the B.I.A. acknowledges that the Osage lands have some attributes of a reservation. Senate Hearings, pt. 1 at 753; 25 C.F.R. Part 74.

[23]The term "Indians" includes all Alaska Natives. *See*, discussion, *supra* note 1.

[24]Senate Hearings, pt. 1 at 753. The number given is 56,795, which exceeds the B.I.A.'s 1970 population estimate for native Alaskans by 5,267. *Supra* note 4. Also included are 2778 reservation residents. *Supra* note 5.

[25]Senate Hearings, pt. 1 at 753.

[26]*See, Supra* note 22. The B.I.A.'s position is not brand new, however. Congressman Edmondson quotes Assistant B.I.A. Commissioner Rex Lee as stating in 1956 that the B.I.A. firmly agreed that Oklahoma Indians would be covered by the phrase "on or near Indian reservations." 102 CONG. REC. 15188 (July 27, 1956).

[27]Senate Hearings, pt. 1 at 753.

[28]*Id.* B.I.A. SERVICE POPULATION REPORT, Appendix A, *infra.*

[29]U.S. DEPT. OF COMMERCE, ECONOMIC DEVELOPMENT ADMINISTRATION, FEDERAL AND STATE INDIAN RESERVATIONS; AN E.D.A. HANDBOOK 1-11, *supra* note 4.

[30]U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 163 (1969).

[31]Census data by tribe are not yet available, so that the number of native California Indians is an estimate. The B.I.A. report for 1970 shows 5,677 Indians living on California reservations. Senate Hearings, pt. 1 at 753. Approximately 32,000 Indians lived outside large metropolitan areas in 1970. 1970 CENSUS, FINAL REPORT PC(1)-B6 at 6-86. Most of these Indians were probably natives of California. A percentage of the 59,000 other Indians in the state were also probably native California Indians.

are viewed by the B.I.A. in Washington, D.C. as living near reservations,[32] even though California has more than 70 reservations spread over the length and breadth of the state.[33] Aggravating this dichotomy is a B.I.A. affidavit swearing that the Bureau treats all off-reservation, native California Indians as residing near reservations.[34]

The reason for this absurd situation is that "near a reservation" is an undefined term. The B.I.A. has no idea what it does or should mean.[35] If the Bureau's figure of 95,000 is modified by subtracting improperly included reservation Indians in Alaska[36] and adding the native, off-reservation Indians in California covered by the B.I.A.'s own affidavit, the total number of Indians residing near reservations is at least 125,000.[37]

Whatever their number, Indians residing near reservations are usually considered within the jurisdiction of the B.I.A. and eligible for its services.[38] Some Bureau programs may have no application to those off-reservation Indians, however. For example, off-reservation areas are outside the law and order jurisdiction of the B.I.A. One service—welfare—is denied to off-reservation Indians regardless of how close to a reservation they live, except in Alaska and Oklahoma.[39] Another program, housing improvement, is subject to conflicting B.I.A. policy pronouncements. On the one hand the Bureau states "By policy the Housing Improvement Program is limited to Indians who reside on reservations or trust land."[40] On the other hand, the Bureau writes as justification for its housing appropriation:

> It is now apparent that there are certain segments of the Indian population and areas that we thought would be eligible for other federal programs but simply cannot be served, such as certain areas of the country where small bands of Indians have been living under the most miserable conditions. Additional factors such as land ownership problems, lack of lands, and meager income also make it impractical to use other federal housing programs. At present these people can only be served adequately by the Housing Improvement Program.[41] [Emphasis added]

[32]Senate Hearings, pt. 1 at 753.

[33]Senate Hearings, pt. 3 at 3319-3323. A rancheria is legally a reservation. Opinion M 28958 of the Interior Department Solicitor (1939); Hearings on H.R. 2576, H.R. 2824, H.R. 2838, and H.R. 6364 before the Indian Affairs Subcommittee of the House Committee on Interior and Insular Affairs, 85th Cong., 1st Sess. at p. 67-68 (1957).

[34]Barker Affidavit, Appendix B, *infra.*

[35]*See, supra* note 11.

[36]*See, supra* note 24 (last sentence).

[37]The inclusion of 5,204 Oklahoma Indians is subject to question, of course. *See* text accompanying notes 26 and 27, *supra.* By way of compensation, perhaps, the 125,000 do not include an unknown number of Navajos who reside near the Navajo reservation but whom the B.I.A. reports as living on the reservation. *Supra* note 4.

[38]*See, Supra* note 14; *but see* LOESCH MEMORANDUM, Appendix C, *infra;* Remarks of Ernest Stevens, Director of Community Service, B.I.A., Senate Hearings, pt. 1 at 752; Remarks of B.I.A. Commissioner Louis Bruce, Senate Hearings, pt. 1 at 936.

[39]R. Wolf, *supra* note 20 at 610.

[40]Senate Hearings, pt. 1 at 940.

[41]Senate Hearings, pt. 1 at 797; House Hearings, pt. 2 at 1121.

Education is the one area in which some data is available for comparing service to Indians who live on reservations with service to those who live near reservations. In 1970-71 the B.I.A.'s Albuquerque Area Office granted scholarships to 318 students.[42] Seventy-five percent lived on reservations; twenty-five percent lived off or near reservations.[43] No priority was given to reservation Indians, and no applicants were rejected.[44] The Minneapolis Area Office had a similar statistical breakdown: 175 to 200 of the 580 students receiving scholarships were off-reservation.[45] Unlike Albuquerque, however, Minneapolis gave priority to reservation residents.[46] In the Portland area the situation was still different. Reservation Indians were given priority and received all but 8 of 360 scholarships.[47] Apparently the B.I.A.'s area offices do not know Washington's position on the provision of services to Indians who reside near reservations.

The next category of Indians receiving Bureau services are Indians living in former reservation areas of Oklahoma.[48] They number approximately 81,000.[49] As noted above,[50] over 5,000 are treated, for no apparent reason, as living near reservations. The remaining 76,000 are regarded as reservation Indians in determining eligibility for B.I.A. services.[51] Even the Indians in this latter group do not receive all Bureau services, however. Examples of missing programs are fire suppression and irrigation.[52]

Beneficial owners of trust property comprise the fourth group of Indians served by the B.I.A. Their beneficial interests may be in real property, such as allotments, or in trust funds. The services provided in connection with real property include maintenance of records, leasing, and probate.[53] Trust funds are managed to increase their earnings.[54]

The number of Indians receiving such services is not available either by catagories or *in toto*. Residence does not control the provision of the services, however. A beneficial owner of trust property

[42]Phone conversation between Barbara Bourhis, law clerk, C.I.L.S., and Effie Marmon, Scholarship Director, All Indian Pueblo Council, Sept. 10, 1971.

[43]*Id.*

[44]*Id.*

[45]Phone conversation between Barbara Bourhis, law clerk, C.I.L.S., and Paul Melctior, Director of Education, Minneapolis, Area Office, B.I.A., Sept. 8, 1971.

[46]*Id.*

[47]Phone conversation between Barbara Bourhis, law clerk, C.I.L.S., and F. Donald Kasper, Area Social Worker, Portland Area Office, B.I.A., Sept. 8, 1971.

[48]*See, supra* notes 15 and 22.

[49]Information supplied by B.I.A., Senate Hearings, pt. 1 at 753.

[50]*See, supra* notes 26 and 27, and accompanying text.

[51]Information supplied by B.I.A., Senate Hearings, pt. 1 at 753.

[52]DEPT. OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, BUDGET SUMMARY, State of Oklahoma (Appendix D).

[53]B.I.A. Appropriation Justification Statement, Senate Hearings, pt. 1 at 874; B.I.A. Appropriation Justification Statement, House Hearings, pt. 2 at 1234.

[54]B.I.A. Appropriation Justification Statement, Senate Hearings, pt. 1 at 874; B.I.A. Appropriation Justification Statement, House Hearings, pt. 2 at 1234.

receives the same services regardless of where he lives,[55] but the cost of providing the services is greater for urban Indians according to the B.I.A.[56]

Finally, the Bureau of Indian Affairs serves urban Indians.[57] At the very least, urban Indians receive property management services.[58] Urban Indians are also the beneficiaries of the employment assistance program.[59] This latter point is often obscured, because the employment assistance program is considered to be only for Indians who live on or near reservations.[60] At the heart of employment assistance, however, has been relocation;[61] so that while most Indians receiving employment assistance come from on or near reservations,[62] they move to and become urban Indians in the process of receiving vocational training.

Moreover, Indians relocated by the B.I.A. under the employment assistance program receive much more than job training and placement. Also provided by the B.I.A. are subsistence allowances,[63] money for furniture,[64] health care,[65] legal services,[66] and housing.[67] These additional benefits may continue for up to five years or more after relocation.[68] One little known B.I.A. program provides a down payment of up to $2,000 on a house purchased by a relocated Indian as much as five years after relocation.[69]

How many of the at least 240,000[70] urban Indians receive property

[55]Testimony of B.I.A. Commissioner Bruce, Senate Hearings, pt. 1 at 755; Statement of B.I.A. Commissioner Bruce, House Hearings, pt. 2 at 1297-1298.

[56]Testimony of B.I.A. Commissioner Bruce, Senate Hearings, pt. 1 at 755.

[57]*See, supra* note 17.

[58]*See, supra* notes 55 and 56 and accompanying text.

[59]Testimony of B.I.A. Commissioner Bruce, House Hearings, pt. 2 at 1143.

[60]Testimony of B.I.A. Commissioner Bruce, Senate Hearings, pt. 1 at 754; Information supplied by B.I.A., Senate Hearings, pt. 1 at 940; Testimony of Commissioner Bruce, House Hearings, pt. 2 at 1096.

[61]S.REP. No. 2664, 84th Cong., 2d Sess. (1956); Testimony of B.I.A. Commissioner Bruce, Senate Hearings, pt. 1 at 754. The policy of tying employment assistance to relocation may be changing. On January 12, 1972, the B.I.A. announced that its employment assistance program would emphasize the training of Indians for jobs on reservations. Statement of Louis Bruce at 9-10.

[62]*See, supra* note 60; Information supplied by B.I.A., House Hearings, pt. 2 at 1297. Generally, the B.I.A. will provide employment assistance only to an Indian whom the Bureau itself has moved to a city, but exceptions are made. Testimony of Philip Acker, Chief, Division of Employment Assistance, B.I.A., House Hearings, pt. 2 at 1183-1184.

[63]Information supplied by B.I.A., Senate Hearings, pt. 1 at 937.

[64]*Id.*

[65]*Id.;* Testimony of Emery Johnson, Director, Indian Health Service, House Hearings, pt. 4 at 1083.

[66]Gabourie, *Justice and the Urban American Indian*, 46 CAL. ST. B. J. 36, (1971).

[67]Information supplied by B.I.A., Senate Hearings, pt. 1 at 937; Testimony of B.I.A. Commissioner Bruce, House Hearings, pt. 2 at 1143.

[68]Testimony of Philip Acker, Chief, Division of Employment Assistance, B.I.A., House Hearings, pt. 2 at 1183; *But see* Testimony of Philip Acker, Senate Hearings, pt. 1 at 760 (3 year limit).

[69]RURAL HOUSING ALLIANCE, LOW INCOME HOUSING BULLETIN No. 70-4 at p. 1 (April, 1970) and No. 70-11 at p. 2 (November, 1970).

[70]*See, supra* notes 7 and 9.

management services or employment assistance is not known. Approximately 79,000 Indians had received employment assistance through June 30, 1970.[71] 69,000 of the 79,000 obtained jobs resulting in benefits to over 150,000 persons.[72] The employment assistance program is fourteen years old,[73] however, so many of the 79,000 no longer receive training. In addition, some of the trainees and their families did not relocate to urban areas,[74] and many of those who did relocate have since returned to reservations.[75]

THE INDIAN HEALTH SERVICE

The primary programs of the Indian Health Service supply health services and environmental health facilities. Health services include medical care, dental care, hospitalization, and alcoholism treatment.[76] Environmental health facilities are water and sanitation systems.[77]

Health services are provided both by I.H.S. employees in I.H.S. facilities and by doctors and hospitals under contract to I.H.S. Service provided by I.H.S. employees in I.H.S. facilities is known as direct care and is available to any Indian who presents himself at an I.H.S. clinic or hospital regardless of where he lives.[78] Reservation Indians are prefered for contract care.[79]

420,000 Indians receive direct care,[80] but the number receiving contract

[71]B.I.A. Appropriation Justification Statement, Senate Hearings, pt. 1 at 798-799; B.I.A. Appropriation Justification Statement, House Hearings, pt. 2 at 1122-1123.

[72]B.I.A. Appropriation Justification Statement, Senate Hearings, pt. 1 at 798-799; B.I.A. Appropriation Justification Statement, House Hearings, pt. 2 at 1122-1123.

[73]Act of August 3, 1956, c. 930, 70 Stat. 986, 25 U.S.C. §309.

[74]B.I.A. Appropriation Justification Statement, Senate Hearings, pt. 1 at 798; B.I.A. Appropriation Justification Statement, House Hearings, pt. 2 at 1122.

[75]Testimony of Philip Acker, Chief, Division of Employment Assistance, B.I.A., House Hearings, pt. 2 at 1181; Price, *The Migration and Adaption of American Indians to Los Angeles*, 27 HUMAN ORGANIZATION 168, 171 (1968). An Indian who returns to his reservation is considered eligible for B.I.A. services. Testimony of Charles Rovin, Chief, Division of Social Services, B.I.A., Senate Hearings, pt. 1 at 759.

[76]Statement of Emery Johnson, Director, I.H.S., Senate Hearings, pt. 2 at 1318-1328; Statement of Emery Johnson, House Hearings, pt. 4 at 980-983.

[77]Statement of Emery Johnson, Director, I.H.S., Senate Hearings, pt. 2 at 1328-1329; Statement of Emery Johnson, House Hearings, pt. 4 at 983.

[78]Testimony of Emery Johnson, Director, I.H.S., House Hearings, pt. 4 at 1087. Some I.H.S. hospitals and clinics are located in urban areas. Examples are the hospitals in Phoenix, Arizona and Albuquerque, New Mexico and the out-patient clinic in Albuequerque. House Hearings, pt. 4 at 1103; Indian Health Service Press release of December 16, 1970 in House Hearings, pt. 6 at 78.

[79]Testimony of Emery Johnson, Director, I.H.S., House Hearings, pt. 4 at 1087. The preference for reservation Indians is different in different areas. For example, in the Billings area an Indian is ineligible for contract care if he has been off-reservation for more than one year. Phone conversation between Kathy Dashiell, law clerk, C.I.L.S., and Vera Falstead, Program Analyst, I.H.S., Billings, Aug. 20, 1971. In the Aberdeen area an off-reservation Indian is eligible for contract care if he lives in a rural county, but he is second in priority to reservation Indians for such care. Phone conversation between Kathy Dashiell, C.I.L.S., and Mr. Nolan, Program Analyst, I.H.S., Aberdeen, Aug. 20, 1971.

[80]Statement of Emery Johnson, Director, I.H.S., Senate Hearings, pt. 2 at 1318; Statement of Emery Johnson, House Hearings, pt. 4 at 980.

care is not available. Indians in some states receive little or no care of either kind.[81]

Water and sanitation facilities go predominantly into new and improved homes provided by the B.I.A., the Department of Housing and Urban Development, and tribal housing authorities.[82] Accordingly, most of the facilities go to reservation Indians.[83] I.H.S. had brought pure water and sanitation to 52,000 Indian homes by July of 1971.[84]

THE LEGALITY OF B.I.A. AND I.H.S. SERVICE TO OFF-RESERVATION INDIANS

The relationship between the United States and Indians has been characterized as resembling that of a guardian to his wards.[85]

With respect to property, the characterization is often accurate. Whenever the United States takes legal title to or otherwise assumes control of Indian property, its handling of the property must be judged by the most exacting fiduciary standards.[86] This is so whether the trust property is land[87] or money,[88] whether the property belongs to an individual[89] or a tribe,[90] and whether a beneficiary is or is not a reservation Indian.[91]

Use of the ward/guardian description is a matter of controversy where property is not involved, however. *Gila River Pima-Maricopa Indian Community v. United States*,[92] the only case decided so far on the subject, held that the United States has no legally enforceable trust obligation to provide Indians—reservation or otherwise—with education and medical services in the absence of provisions in treaties, statutes, executive orders or agreements. A farsighted commentator on Indian affairs, Chauncey Goodrich, concluded in 1926, though, that the entire corpus of judicial decisions imposes on the United States an "absolute"

[81]Testimony of Emery Johnson, Director, I.H.S., House Hearings, pt. 4 at 1081-1082.

[82]I.H.S. Appropriation Justification Statement, Senate Hearings, pt. 2 at 1383; Testimony of Emery Johnson, Director, I.H.S., Senate Hearings, pt. 2 at 1387-1388; Senate Hearings, pt. 2 at 1399-1400; Testimony of Emery Johnson, Director, I.H.S., House Hearings, pt. 4 at 1072-1073; I.H.S. Appropriation Justification Statement, House Hearings, pt. 4 at 1101.

[83]Information supplied by I.H.S., Senate Hearings, pt. 2 at 1389-1391.

[84]Statement of Emery Johnson, Director, I.H.S., Senate Hearings, pt. 2 at 1328; I.H.S. Appropriation Justification Statement, Senate Hearings, pt. 2 at 1381; Statement of Emery Johnson, House Hearings, pt. 4 at 983; I.H.S. Appropriation Justification Statement. House Hearings, pt. 4 at 1042; 1100.

[85]Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831); United States v. Payne, 264 U.S. 446, 448 (1928).

[86]Seminole Nation v. United States, 316 U.S. 286, 297 (1941).

[87]Navoja Tribe of Indians v. United States, 364 F.2d 320, 322 (Ct. Cl. 1966); United States v. Seminole Nation, 173 F.Supp. 784, 789-790 (Ct. Cl. 1959).

[88]Menominee Tribe of Indians v. United States, 59 F.Supp. 137, 141 (Ct. Cl. 1945).

[89]Mott v. United States, 283 U.S. 747 (1931).

[90]*See* cases cited *supra* notes 87 and 88.

[91]Testimony of B.I.A. Commissioner Bruce, Senate Hearings, pt. 1 at 755; Statement of Commissioner Bruce, House Hearings, pt. 2 at 1297-1298.

[92]427 F.2d 1194 (Ct. Cl. 1970), cert. denied 400 U.S. 819 (1970).

duty to care for Indian needs regardless of land ownership.[93] A third view is that taken by the United States Supreme Court in *Board of County Commissioners of Creek County v. Seber*.[94] The Court there upheld the constitutionality of statutes providing tax exemptions only to Indians. It ruled that the United States has not only a duty to protect Indian property but also a power to provide Indians, even if they do not live on reservations, with benefits not provided to other citizens. The power to discriminate in favor of Indians is part of a unique relationship which exists, said the Court, because "the United States overcame the Indians and took possession of their lands, leaving them as uneducated, helpless and dependent people."[95] That special relationship to all Indians, as well as Goodrich's "absolute" duty, may be spoken of in the international law sense as a trusteeship.[96]

Whichever of the three views of the Government's trust obligations eventually prevails, all are consistent in not distinguishing between reservation and off-reservation Indians. Certainly, they afford the B.I.A. no basis for saying—as it does[97]—that it serves reservation Indians as their trustee but cannot serve off-reservation Indians because they are not its wards. A legal basis for denying off-reservation Indians such B.I.A. and I.H.S. services as education and health care must be found, if at all, in treaties and statutes.

Very few treaties impose on the federal government current, mandatory duties unrelated to land. Eight call for physicians,[98] six require blacksmiths,[99] six mandate farmers,[100] five provide for carpenters,[101]

[93]*The Legal Status Of The California Indian*, 14 CAL. L. REV. 157, 163 (1926).

[94]318 U.S. 705 (1943).

[95]*Id.* at 715. *Seber* did not have to and did not consider whether the Government has a duty as well as the power to provide Indians with services unrelated to land management.

[96]SNOW, THE QUESTION OF ABORIGINES IN THE LAW AND PRACTICE OF NATIONS 28-32, 39, 52, 174-191 (1921); CHOWDHURI, INTERNATIONAL MANDATES AND TRUSTEESHIP SYSTEMS 13-36 (especially 14-15, 18, 21), 292, 298-299 (1955); TOUSSAINT, THE TRUSTEESHIP SYSTEM OF THE UNITED NATIONS 5-10 (1956) cf UNITED NATIONS CHARTER, Article 2(2), 73, and 76(b).

[97]Testimony of Leon Cook, Acting Director, Economic Development, B.I.A., House Hearings, pt. 2 at 1294.

[98]Art. 10 of the 1854 TREATY WITH THE NISQUALLY, PUYALLUP, etc., 10 Stat. 1132; Art. 14 of the 1855 TREATY WITH THE DWAMISH, SUQUAMISH, etc., 12 Stat. 927; Art. 11 of the 1855 TREATY WITH THE S'KLALLAM 12 Stat. 933; Art. 10 of the 1855 TREATY WITH THE QUINAIELT, etc. 12 Stat. 971; Art. 5 of the 1864 TREATY WITH THE CHIPPEWA, MISSISSIPPI, AND PILLAGER AND LAKE WINNINBIGOSHISH BANDS, 13 Stat. 693; Art. 10 of the 1868 TREATY WITH THE CROWS, 15 Stat. 648; Art. 7 of the 1868 TREATY WITH THE NORTHERN CHEYENNE AND NORTHERN ARAPAHO, 15 Stat. 655; Art. 10 of the 1868 TREATY WITH THE EASTERN BAND SHOSHONI AND BANNOCK, 15 Stat. 673.

[99]Art. 5 of the 1818 TREATY WITH THE MIAMI, 7 Stat. 189; Art. 5 of the 1864 TREATY WITH THE CHIPPEWA, MISSISSIPPI, AND PILLAGER AND LAKE WINNIBIGOSHISH BANDS, 13 Stat. 693; Art. 6 of the 1865 TREATY WITH THE SIOUX-LOWER BRULE BAND, 14 Stat. 699; Art. 10 of the 1868 TREATY WITH THE CROWS, 15 Stat. 649; Art. 7 of the 1868 TREATY WITH THE NORTHERN CHEYENNE AND NORTHERN ARAPAHO, 15 Stat. 655; Art. 10 of the 1868 TREATY WITH THE EASTERN BAND SHOSHONI AND BANNACK, 15 Stat. 673.

[100]Art. 5 of the 1863 TREATY WITH THE NEZ PERCES, 14 Stat. 647; Art. 5 of the 1864

five prescribe millers,[102] and three compel the furnishing of engineers.[103] Treaties also obligate the Government to provide one tribe with two matrons,[104] another with a teacher,[105] and a third with farms and homes for schools.[106] A few treaties promise a physician, farmer, blacksmith, carpenter, engineer, and miller or $10,000 a year for education.[107] Some treaties provide that the Government will pay a fixed sum indefinitely for services,[108] but the amounts are ludicrous today and probably were inadequate when the treaties were made. Several other treaties require the United States to invest a sum of money and use part of the income for education and other services.[109] The great majority[110] of Indian treaties promised services only for a limited time (long since expired)[111] or merely give the President discretion to provide services.[112] Thus, most tribes have no treaty right to services unrelated to land;[113] and only

---

TREATY WITH THE CHIPPEWA, MISSISSIPPI, AND PILLAGER AND LAKE WINNIBIGOSHISH BANDS, 13 Stat. 693; Art. 6 of the 1865 TREATY WITH THE SIOUX-LOWER BRULE BAND, 14 Stat. 699; Art. 10 of the 1868 TREATY WITH THE CROWS, 15 Stat. 648; Art. 7 of the 1868 TREATY WITH THE NORTHERN CHEYENNE AND NORTHERN ARAPAHO, 15 Stat. 655; Art. 10 of the 1868 TREATY WITH THE EASTERN BAND SHOSHONI AND BANNACK, 15 Stat. 673.

[101]Art. 5 of the 1863 TREATY WITH THE NEZ PERCES, 14 Stat. 647; Art. 5 of the 1864 TREATY WITH THE CHIPPEWA, MISSISSIPPI, AND PILLAGER AND LAKE WINNIBIGOSHISH BANDS, 13 Stat. 693; Art. 10 of the 1868 TREATY WITH THE CROWS, 15 Stat. 648; Art. 7 of the 1868 TREATY WITH THE NORTHERN CHEYENNE AND NORTHERN ARAPAHO, 15 Stat. 655; Art. 10 of the 1868 TREATY WITH THE EASTERN BAND SHOSHONI AND BANNACK, 15 Stat. 673.

[102]Art. 5 of the 1834 TREATY WITH THE MIAMI, 7 Stat. 189; Art. 5 of the 1863 TREATY WITH THE NEZ PERCES, 14 Stat. 647; Art. 10 of the 1868 TREATY WITH THE CROWS, 15 Stat. 648; Art. 7 of the 1868 TREATY WITH THE NORTHERN CHEYENNE AND NORTHERN ARAPAHO, 15 Stat. 655; Art. 10 of the 1868 TREATY WITH THE EASTERN BAND OF SHOSHONI AND BANNACK, 15 Stat. 673.

[103]Art. 10 of the 1868 TREATY WITH THE CROWS, 15 Stat. 648; Art. 7 of the 1868 TREATY WITH THE NORTHERN CHEYENNE AND ARAPAHO, 15 Stat. 655; Art. 10 of the 1868 TREATY WITH THE EASTERN BAND SHOSHONI AND BANNACK, 15 Stat. 673.

[104]Art. 5 of the 1863 TREATY WITH THE NEZ PERCES, 14 Stat. 647.

[105]Art. 4 of the 1855 TREATY WITH THE MOLALA, 12 Stat. 981.

[106]Art. 3 of the 1857 TREATY WITH THE PAWNEE, 11 Stat. 729.

[107]Art. 9 of the 1867 TREATY WITH THE KIOWA AND COMANCHE, 15 Stat. 581; Art. 9 of the 1867 TREATY WITH THE CHEYENNE AND ARAPAHO, 15 Stat. 593; Art. 10 of the 1868 TREATY WITH THE UTE, 15 Stat. 619 (no physician or engineer); Art. 9 of the 1868 TREATY WITH THE SIOUX-BRULE, OGLALA, MINICONJOU, YANKTONAI, HUMKPAPA, BLACKFEET, CUTHEAD, TWO KETTLE, SANS ARES, AND SANTEE—AND ARAPAHO, 15 Stat. 635.

[108]*E.g.*, Art. 13 of the 1820 TREATY WITH THE CHOCTAW, 7 Stat. 210; Art. 3 of the 1857 TREATY WITH THE PAWNEE, 11 Stat. 729; Art. 5 of the 1863 TREATY WITH THE CHIPPEWA OF THE MISSISSIPPI AND THE PILLAGER AND LAKE WINNIBIGOSHISH BANDS, 12 Stat. 1249.

[109]*E.g.*, Art. 10 of the 1835 TREATY WITH THE CHEROKEE, 7 Stat. 478; Art. 2 of the 1837 TREATY WITH THE SAUK AND FOXES, 7 Stat. 540; Art. 4 of the 1851 TREATY WITH THE SIOUX-SISSETON AND WAHPETON BANDS, 10 Stat. 949.

[110]*See*, II KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES (1904).

[111]*E.g.*, Art. IV of the 1807 TREATY WITH THE OTTAWA, etc., 7 Stat. 105; Arts. VI & VII of the 1833 TREATY WITH THE PAWNEE, 7 Stat. 448.

[112]*E.g.*, Art. 8 of the 1819 TREATY WITH THE CHIPPEWA, 7 Stat. 203; Art. 5 of the 1824 TREATY WITH THE IOWA, 7 Stat. 231; Art. 13 of the 1846 TREATY WITH THE COMANCHE, AIONAI, ANADARKO, CADDO, etc., 9 Stat. 844.

[113]*See also*, the very small ($161,000) appropriation requested by B.I.A. to satisfy treaty obligations. Senate Hearings, pt. 1 at 15-16.

One tribe, Couer d'Alene, is entitled under a ratified, non-treaty agreement to

in the absence of statutes vesting the B.I.A. and I.H.S. with the authority to serve all Indians to the same extent that treaties authorize service to some tribes would the B.I.A. and I.H.S. be justified in arguing—as they do[114]—that treaties form a basis for a policy of serving only reservation Indians.

In point of fact, federal laws make virtually all B.I.A. and I.H.S. services available to every unterminated[115] Indian regardless of where he or she lives. The principal law on this subject is 25 U.S.C. § 13, often referred to as the Snyder Act. It expressly governs expenditures for education, welfare, health, property management, industrial assistance, irrigation, law and order, and numerous other programs. Housing improvement, though not expressly mentioned, is also carried out under section 13.[116]

Other than in Alaska,[117] the B.I.A. and I.H.S. have authority independent of section 13 to carry out only a fraction of the program listed above,[118] except by contracting with state and local governments

---

have the Government supply a doctor, a blacksmith, a carpenter, and medicines. Act of March 3, 1891, c. 543, §19, 26 Stat. 989, 1026 at 1029.

[114]Letter from B.I.A. Commissioner Louis Bruce in House Hearings, pt. 2 at 1140; Testimony of Emery Johnson, Director, I.H.S., Housing Hearings, pt. 4 at 1083; Loesch Memorandum, Appendix C, *infra*.

[115]A terminated Indian is not entitled to the services performed by the United States for Indians because of their status as Indians. 25 U.S.C. §§564q (Klamath Tribe), 677v (Ute Indians of Utah), 703 (Western Oregon Indians), 722 (Alabama and Coushatta Indians of Texas), 757 (Paiute Indians of Utah), 803 (Wyandotte Tribe of Oklahoma), 823 (Peoria Tribe of Oklahoma), 848 (Ottawa Tribe of Oklahoma), 899 (Menominee Tribe of Wisconsin), 935 (Catawba Tribe of South Carolina), and 980 (Ponca Tribe of Nebraska); 78 Stat. 390 (California Indians). Not all Indians in the groups listed are terminated. Only mixed-blood Utes are terminated. 25 U.S.C. §677v. California Indians are terminated only if they received assets from a reservation that voted to terminate or were dependents of distributees at the time of termination. 72 Stat. 619, §10 as amended by 78 Stat. 390.

[116]*See* B.I.A. Appropriation Justification Statement, Senate Hearings, pt. 1 at 794; B.I.A. Appropriation Justification Statement, House Hearings, pt. 2 at 1118. The B.I.A. treats housing improvement as welfare. B.I.A. Appropriation Justification Statement, Senate Hearings, pt. 1 at 794; B.I.A. Appropriation Justification Statement, House Hearings, pt. 2 at 1118.

[117]*See, infra,* notes 160-167 and accompanying text.

Sections 1 and 4 of the NAVAJO-HOPI REHABILITATION ACT (25 U.S.C. §§631, 634) authorize a broad spectrum of B.I.A. programs for Navajo and Hopi Indians, but authorized expenditures are limited to $108,570,000 plus "such further sums as may be necessary for or appropriate to the annual operation and maintenance" of projects funded with the $108,570,000. Approximately $60,000,000 had been spent by 1958 (S. REP. No. 3468, 85th Cong., 2d Sess. (1958) at 6), and $90,000,000 had been allocated through 1962 (YOUNG, THE NAVAJO YEARBOOK: 1961 at 5). No published data can be located showing the amount of the authorization used after 1962. Little if any of the $108,570,000 authorization is likely to remain unused, however, because 25 U.S.C. §632 specifies that the authorized projects were to be completed "so far as practicable" by 1960. The B.I.A. programs still sanctioned by the NAVAJO-HOPI REHABILITATION ACT are thus probably limited to a revolving loan fund (25 U.S.C. §634) and the operation and maintenance of projects previously established with the $108,570,000 (25 U.S.C. §631).

[118]25 U.S.C. §271 empowers the President to hire teachers for Indians. 25 U.S.C. §383 authorizes irrigation projects costing less than $35,000. 25 U.S.C. §§309 and 309a authorize a vocational training program. 25 U.S.C. §§465 and 501 authorize the purchase of new Indian lands. 25 U.S.C. §§469 and 506 authorize expenditures to organize tribes and other Indian groups. 25 U.S.C. §§470, 470a, 471, 482, 506, and

or private organizations.[119] Contracted-for services are a small part of both the B.I.A. and I.H.S. budgets.[120] So too are the programs which are carried out under authorization laws other than section 13.[121] The

---

507 authorize loans for various purposes. 42 U.S.C. §2004a authorizes construction of water and sanitation systems. All these laws are more fully described below.

A number of other authorization laws apply only to one or two tribes (*e.g.*, 25 U.S.C. §634) or only in connection with termination (*e.g.*, 72 Stat. 619 §9 as amended by 78 Stat. 390).

[119]25 U.S.C. §309 authorizes contracts for vocational education. 25 U.S.C. §452 authorizes contracts for education, medical attention, agricultural assistance, and social welfare. 23 U.S.C. §203 permits contracts for road construction. 42 U.S.C. §2002 allows I.H.S. to transfer its facilities when Indian health needs can be better served that way. 42 U.S.C. §2004a sanctions contracts for the construction of water and sanitation systems. 42 U.S.C. §2005 authorizes grants for health services. All are discussed below.

[120]The total B.I.A. appropriation for the fiscal year ending June 30, 1972, is $421,985,000. 85 Stat. 229. Appropriations allocated to contracts under 25 U.S.C. §452 total $22,702,000. See B.I.A. Appropriation Justification Statement, Senate Hearings, pt. 1 at 783; B.I.A. Appropriation Justification Statement, House Hearings, pt. 2 at 1107; S.REP. No. 92-263, 92d Cong., 1st Sess. (1971) at 6; H.REP. No. 92-386, 92d Cong., 1st Sess. (1971) at 4. Included in that $22,702,000 is $4,295,000 for education contracts in Alaska. B.I.A. Appropriation Justification Statement, Senate Hearings, pt. 1 at 782, 786; B.I.A. Appropriation Justification Statement, House Hearings, pt. 2 at 1106, 1110. Therefore, no funds were appropriated under the Act of May 14, 1930, c. 273, §1, 46 Stat. 321. Appropriations for contracts under 23 U.S.C. §203 total $25,600,000. 85 Stat. 229. The amount appropriated for contracts pursuant to 25 U.S.C. §309 is not known, but cannot exceed $39,208,000 (*Infra*, note 121; 3rd paragraph) and is probably a good deal less. B.I.A. contracting authority is therefore $48,302,000 plus less than $39,000,000 for vocational training out of $421,985,500.

The total I.H.S. appropriation for the fiscal year ending June 30, 1972 is $183,427,000. 85 Stat. 229. Of that, $28,662,000 is for contract medical services. *See*, Senate Hearings, pt. 4 at 1279; House Hearings, pt. 4 at 1029, 1037; S.REP. No. 92-263, *supra* at 26; H.REP. No. 92-386, *supra* at 9.

[121]The total B.I.A. appropriation for the fiscal year ending June 30, 1972, is $421,985,000. 85 Stat. 229. None of that money is for irrigation projects costing less than $35,000. *See*, B.I.A. Appropriation Justification Statement, Senate Hearings, pt. 1 at 910-912; B.I.A. Appropriation Justification Statement, House Hearings, pt. 2 at 1314-1316. None of the money is for loans (see testimony of Edwards Ramirez, Chief, Division of Accounting and Finance, B.I.A., House Hearings, pt. 2 at 1251); and none of the appropriation is for organizing tribes and other Indian groups. Only $1,250 is for the acquisition of new lands (*see*, remarks of Senator Alan Bible, Senate Hearings, pt. 1 at 926; remarks of Congresswoman Julia Butler Hansen, House Hearings, pt. 2 at 1371); and even that may not be under authority of 25 U.S.C. §465 and 501, because it is for the Navajo irrigation project (remarks of Congresswoman Hansen, House Hearings, pt. 2 at 1371).

The $1,250 appropriated for land in the Navajo Irrigation Project is the only money conceivably appropriated pursuant to the NAVAJO-HOPI REHABILITATION ACT. Compare the appropriation act, 85 Stat. 229, with 25 U.S.C. §631 which provides that expenditures under the NAVAJO-HOPI REHABILITATION ACT are to be out of funds appropriated pursuant to 25 U.S.C. §§631-640 and shall be in addition to funds appropriated for the benefit of Indians in general.

No money is appropriated under the authorization laws relating only to Alaska Natives.

$39,208,000 is appropriated for employment assistance. *See*, B.I.A. Appropriation Justification Statement, Senate Hearings, pt. 1 at 798; B.I.A. Appropriation Justification Statement, House Hearings, pt. 2 at 1122; S.REP. No. 92-263, *supra* note 120 at 6; H.REP. No. 92-386, *supra* note 120 at 4.

The amount appropriated for teacher salaries is not known. The B.I.A. requested $39,313,000 for instruction (Senate Hearings, pt. 1 at 789; House Hearings, pt. 2 at 1113), but that figure included travel, textbooks, supplies and materials, equipment and furnishings as well as teacher salaries. It also included pay increases, not all of which were granted. *See*, H.REP. No. 92-308, 92d Cong., 1st Sess. (1971) at 9; S.REP. No. 92-263, *supra* note 120 at 6. $970,000 was requested for new teaching personnel on the basis of 1,665 additional pupils. Senate Hearings, pt. 1

bulk of B.I.A. and I.H.S. appropriations are and must be spent pursuant to 25 U.S.C. § 13.[122]

Who are the beneficiaries of 25 U.S.C. § 13? The law is clear and unequivocal. Appropriations which the B.I.A. is directed to expend under section 13 are for "the benefit, care, and assistance of Indians throughout the United States." Absolutely nothing in the law suggests, let alone compels, restricting expenditures under section 13 to Indians who live on reservations or to Indians who live on or near reservations.[123] As the Assistant Solicitor of the Interior Department recently wrote:

> On its face, the underscored language [Indians throughout the United States] is abundantly clear and requires no interpretation. Literally, it authorizes the expenditure of funds for purposes within the named program categories for the benefit of any and all Indians, of whatever degree, whether or not members of federally recognized tribes, and without regard to residence so long as they are within the United States. . . . With language so unequivocal, it is subject to the general rule of law that plain and unambiguous statutory language will be followed and there is no need to resort to extraneous material as an aid to construction.[124]

A "resort to extraneous materials," though unnecessary, confirms that the Synder Act was not intended to exclude off-reservation Indians from B.I.A. services. 25 U.S.C. § 13 was adopted to provide a general B.I.A. authorization law and stop Congressmen from striking, without a vote, parts of B.I.A. appropriations bills which, contrary to

---

at 788; House Hearings, pt. 2 at 1112. On the basis of a total enrollment of 37,505 (B.I.A. Appropriation Justification Statement, Senate Hearings, pt. 1 at 780; B.I.A. Appropriation Justification Statement, House Hearings, pt. 2 at 1104), the appropriation for teachers in B.I.A. schools would seem to be about $21,500,000.

Thus, putting aside the negligible amounts that must be spent to fulfill treaty obligations and that could be spent under the very limited authorization laws referred to *supra* note 118, 2nd paragraph, the amount available for the B.I.A. to spend in fiscal 1972 without contracting and under authority of laws other than 25 U.S.C. §13 would appear to total at most $60,709,250 out of $421,985,000. In all likelihood, the B.I.A. considers its expenditures for teachers as being pursuant to 25 U.S.C. §13; and some of the appropriation for employment assistance was expended under the authorization to make contracts in 25 U.S.C. §309.

$25,950,000 of the I.H.S. appropriation of $183,427,000 (85 Stat. 229) is for sanitation facilities, including water systems. See I.H.S. Appropriation Justification Statements, Senate Hearings, pt. 2 at 1379; Remarks of Senator Alan Bible, Senate Hearings, pt. 2 at 1387; I.H.S. Appropriation Justification Statement, House Hearings, pt. 4 at 1098; H.REP. No. 92-308, *supra*, at 29; S.REP. No. 92-263, *supra*, note 120 at 26; H.REP. No. 92-386, *supra*, note 120 at 9.

[122]In 1942, 42 U.S.C. §2001 transfered the B.I.A.'s "functions, responsibilities, authorities, and duties" relating to health under 25 U.S.C. §13 to the Secretary of Health, Education and Welfare, who carries out these duties through the I.H.S.

At the time of the transfer, the House Interior and Insular Affairs Committee described B.I.A.'s responsibilities in the health field as extending to "all Indians registered as members of the various tribes in the United States and Indians and natives in Alaska." H.REP. No. 870 63d Cong., 1st Sess. (1959). Although that report has little value in construing 25 U.S.C. §13 which was enacted in 1921 (United States v. Southwestern Cable Co., 392 U.S. 157, 170 (1968), the House Committee's report clearly did not purport to restrict health services to reservation Indians.

[123]This point was recognized by the B.I.A. at least as long ago as 1941. Testimony of William Greenwood, Finance Officer, B.I.A., Hearings on H.R. 4590 before the Senate Committee on Appropriations, 77th Cong., 1st Sess., at 161.

[124]Memorandum from the Assistant Solicitor, Division of Indian Affairs, Department of the Interior to the Commissioner of Indian Affairs, Dec. 9, 1971. (Appendix E).

House rules, had not been previously authorized.[125] Supporters of 25 U.S.C. §13 did say that the law would authorize no new Bureau activities,[126] but debate centered on what types of programs the act would sanction; no discussion was had on which Indians would be served under the new law.[127]

Congressional action after 1921, to the limited extent that it is relevant,[128] also supports or is not inconsistent with a straight-forward reading of 25 U.S.C. §13 as authorization for B.I.A. services to both on and off-reservation Indians.[129] Statements by executive department officials that the B.I.A. and I.H.S. lack authority to or are prohibited

[125]S.REP. No. 294, 67th Cong., 1st Sess. (1921); H.REP. No. 275, 67th Cong., 1st Sess. (1921); Remarks of Representative Carter, 61 CONG. REC. 4659-4660, 4671-4672, August 4, 1921.

[126]Remarks of Representative Carter, 61 CONG. REC. 4672, August 4, 1921; Remarks of Representative Snyder, 61 CONG. REC. 4684, August 4, 1921; Remarks of Senator Curtis, 61 CONG. REC. 6529, October 21, 1921.

[127]In any event, the preponderance of the evidence would have shown B.I.A. service to off-reservation Indians prior to passage of the Snyder Act.

For example, the B.I.A. considered the number of Indians under guardianship in 1900, 1910 and 1920 to at least equal the total number of Indians reported by the Census for those years. Compare B.I.A. data for 1900, 1910, 1919 and 1921 (none given for 1920) in H.REP. No. 2503, 82d Cong., 2d Sess. (1952), Table 8, Col. 10, at 1584-1585 with census data for 1900 in United States Census Office, TWELFTH CENSUS OF THE UNITED STATES, Vol. I, Part 1 at CXXIV, 488 (1901), for 1910 in U.S. Dept. of Commerce, Bureau of the Census, THIRTEENTH CENSUS OF THE UNITED STATES, Vol. I at 170 (1913), and for 1920 in U.S. Dept. of Commerce, Bureau of the Census, FOURTEENTH CENSUS OF THE UNITED STATES, POPULATION, Vol. II at 37 (1922).

More detailed indicia of B.I.A. service to off-reservation Indians may be found in Reports of the Commissioner of Indian Affairs. The 1866 Report shows off-reservation California Indians as under Bureau jurisdiction. COMMISSIONER OF INDIAN AFFAIRS, REPORT FOR THE YEAR 1866, 94 (1866). The Report for 1908 tells of off-reservation Indian children in B.I.A. boarding schools. COMMISSIONER OF INDIAN AFFAIRS, REPORT TO THE SECRETARY OF THE INTERIOR, 1908, 17 (1909).

One possible, though far from conclusive, manifestation of a contrary policy appears in 1911. The Commissioner wrote in that year:

> The Government no longer looks upon its duty to the Indians as merely involving an honest accounting for its trusteeship of Indian lands and funds. It considers the trusteeship of this property as the means of bringing the Indian to a position of self-reliance and independence where he may be able to accept the opportunities and responsibilities of American citizenship. Commissioner of Indian Affairs, Report to the Secretary of the Interior for the Fiscal Year Ended June 30, 1910, at 27.

Relevant, but unenlightening, are some tables appearing in the Commissioner's reports for a number of years beginning in 1912. One table (2) shows the total Indian population and another table (3) shows a smaller number of Indians under federal supervision. *E.g.*, COMMISSIONER OF INDIAN AFFAIRS, REPORT TO THE SECRETARY OF THE INTERIOR FOR THE FISCAL YEAR ENDED JUNE 30, 1911, 54-72. Those under federal supervision are in the classes "unallotted," "holding trust patents," and "holding fee patents." Although those designated as unallotted may have been only reservation Indians, such does not seem to have been the case, for the number of Indians under federal supervision in table 3 is almost the same as the total number of Indians in table 2 less the number of "Freedmen" and inter-married whites of the Five Civilized Tribes listed as Indians in table 2. Certainly, the tables do not demonstrate a lack of Bureau services to off-reservation Indians in the years before the Snyder Act. See the second paragraph of this note.

[128]United States v. Southwestern Cable Co., *supra* note 122 at 170.

[129]An act of June 7, 1956, 70 Stat. 254, declares that people of Indian descendent in Robeson and adjoining counties of North Carolina shall be known as Lumbee Indians but that "nothing in this act shall make such Indians eligible for any services performed by the United States for Indians because of their status as Indians." The

reason for this law is not altogether clear. *See*, Preamble to 70 Stat. 254; H.REP. No. 1654, 84th Cong., 2d Sess. (1956); S.REP. No. 2012, 84th Cong., 2d Sess. (1956); Remarks of Senator Jordan, 117 CONG. REC. S16971, (October 28, 1971); 1950 CENSUS, SPECIAL REPORT P-E, No. 3B at 3B-4—3B-5; 1960 Census, Final Report PC(2)-1C at X. The reason for the prohibition on B.I.A. services is clear however. The Lumbees are off-reservation Indians. U.S. DEPT. OF COMMERCE, FEDERAL AND STATE INDIAN RESERVATIONS; AN E.D.A HANDBOOK (1971) *supra* note 4. The bill passed the House without the prohibition only after its sponsor, Representative Carlyle, stated that it would not commit the federal government to furnish services or money to the Lumbees. 102 CONG. REC. 2900, (February 20, 1956). The Senate amended the prohibition in because of an Interior Department letter stating:

> The United States has entered into no treaty or agreement with the Indians of Robeson and adjoining counties, and it has recognized no obligation to furnish them services that are furnished to the citizens of this country who are recognized as Indians. We are therefore unable to recommend that the Congress take any action which might ultimately result in the imposition of additional obligations on the Federal Government or in placing additional persons of Indian blood under the jurisdiction of this Department. . . . Except for the possibility of becoming entitled to Federal services as Indians, the position of this group of Indians would not be enhanced by enactment of this bill. . . . If your committee should recommend the enactment of the bill, it should be amended to indicate clearly that it does not make these persons eligible for services provided through the Bureau of Indian Affairs to other Indians. S.REP. No. 2012, 84th Cong., 2d Sess., *supra*.

Recently, Senator Jordan introduced a bill to repeal the prohibition on B.I.A. services to the Lumbees. S.2763, 92d Cong., 1st Sess. In introducing the bill the Senator said:

> My bill would establish as a matter of law that these people [the Lumbees] . . . are entitled to the same rights, privileges and benefits accorded other Indians not living on reservations. . . . This bill would assure that Lumbee Indians be treated as other Indian groups and would enable them to have full access to all Federal programs and services except those administered for reservation Indians by the Bureau of Indian Affairs. 117 CONG. REC. S16970—S16971, (October 28, 1971).

Another law from 1956, 25 U.S.C. §309, authorizes vocational training primarily for Indians residing on or near reservations. The limitation to Indians on or near reservations would have been unnecessary if the Bureau could only serve reservation Indians. The reason for the limitation is explained *infra*, note 175.

> In the 87th Congress a bill was introduced which would have provided: In carrying out . . . 25 U.S.C. §13 . . . every person domiciled in the State of Minnesota, the State of North Dakota, the State of South Dakota, or the State of Wisconsin who is . . . regarded as an Indian within the community where he resides whether on or off reservation . . . shall be held and considered to be an enrolled Indian for the purposes of providing education, medical assistance, agricultural assistance and social welfare aid, including relief of distress. H.R. 9621, 87th Cong., 2d Sess. (1962).

A similar bill which would also have covered Washington and Idaho was introduced at the next session of Congress. H.R. 6279, 88th Cong., 1st Sess (1963). Both bills were referred to committee (see 108 CONG. REC. 74 (January 11, 1962); 109 CONG. REC. 8544 (May 14, 1963)), where they died. The record does not show whether they failed to pass because Congress disapproved of them or because Congress considered them unnecessary.

The act of December 19, 1947, c. 521, 61 Stat. 940, authorized a $2,000,000 appropriation to provide emergency relief, employment, and help in securing employment "for needy Navajo and Hopi Indians who are on their reservations or allotted holdings and for those who leave their reservation for employment." Emergency relief for reservation Navajos and Hopis was necessary, because those Indians were not receiving state welfare. Remarks of Congressman Watkins, 93 CONG. REC. 11358 (December 15, 1947). No reason was given in the committee reports or floor debates for providing relief to Indians who left their reservations for employment. See H.Rept. No. 1156, 80th Cong., 1st Sess. (1947); S.REP. No. 776, 80th Cong., 1st Sess. (1947); 93 CONG. REC. 11009, 11116, 11187, 11239, 11321, 11356, 11413, 11450, 11490, 11571, 11763. The likeliest explanation is that B.I.A. welfare and help in securing employment were expected to induce Navajos and Hopis to leave their reservations.

A perceived need for relocation is certainly the reason why 25 U.S.C. §631, whose primary focus was alleviating the great hardship on the Navajo and Hopi Reservations, authorized a broad range of assistance to off-reservation Navajos and Hopis. S.REP. No. 1474, 81st Cong., 2d Sess. (1950) at 3; Remarks of Congressman

by law from serving off-reservation Indians[130] are clearly erroneous. For the B.I.A. and I.H.S. to create residency restrictions which are not in the law and which exclude some Indians from the benefits of 25 U.S.C. §13 is patently illegal.[131]

No more legal are efforts limiting the residences of Indian beneficiaries under 25 U.S.C. §§271 and 383 and 42 U.S.C. §§2002, 2004a and 2005.

25 U.S.C. empowers the President to hire teachers for "Indians." Susceptibility to "improvement in . . . habits and condition," is the only restriction on which Indians shall be taught.[132] 25 U.S.C. §383 authorizes construction of irrigation systems costing less than $35,000 on "any Indian reservation, allotments, or lands." The phrase "or lands" would be meaningless if construction could only take place on reservations and allotments.[133]

42 U.S.C. §§2002 and 2005 authorizes I.H.S. to provide for the health needs of "the Indians" by contracts with and grants to state and local governments and private non-profit corporations. 42 U.S.C. §2004a allows I.H.S. to provide water and sanitation systems, either on its own or by contract, to "Indian homes, communities, and lands" for the benefit of "an Indian tribe, band, group, community or individual." Broader and less restrictive language would be hard to imagine.[134]

What has been said about the preceeding sections goes double for 25 U.S.C. §452. That law—known as the Johnson O'Malley Act[135]—

D'Ewart, 96 CONG REC. 2087 (February 21, 1950); *see also*, H.REP. No. 963, 81st Con., 1st Sess. (1949) at 4-5; Statement of William Warne, Assistant Secretary of Interior in S.Rept.No. 550, 81st Cong., 1st Sess. (1949) at 6-7; B.I.A. Statement of April 8, 1949 in S.Rep.No. 550, 81st Cong., 1st Sess., *supra*, at 10. Clarity of scope, not the need for authority, was the reason for specific reference to off-reservation Indians in 25 U.S.C. §631.

[130]Responses of Robert Robertson, Executive Director, National Council on Indian Opportunity to questions by Senator Charles Percy, Senate Hearings, pt. 2 at 1472; Letter from Phillip Acker, Chief, Division of Employment Assistance, B.I.A., to Edith Johns in House Hearings, pt. 2 at 1142, Jan. 7, 1971.

[131]Smith v. Commissioner of Internal Revenue, 332 F.2d 671, 673 (9th Cir. 1964); Leecy v. United States, 190 Fed. 289 (8th Cir. 1911).

The rights of off-reservation Indians under 25 U.S.C. §13 have been raised in two lawsuits. In *Ruiz v. Hickel*, U.S. Dist. Court for Arizona, Civ-2408, off-reservation Papago Indians are seeking B.I.A. welfare benefits. In *Croy v. Morton*, U.S. Dist. Court for the Eastern Dist. of California, Civil No. S-2305, off-reservation rural California Indians claim a right to share in the Bureau's housing improvement program. *Croy* is undecided. *Ruiz* was dismissed without opinion or explanation on November 4, 1969, and may have been based on a narrow reading of appropriations acts (*See* notes 172-187 *infra* and accompanying text) rather than on a conclusion that 25 U.S.C. §13 limits B.I.A. services to on-reservation Indians. In any event, *Ruiz* is now before the Ninth Circuit Court of Appeals. Case No. 25568.

[132]25 U.S.C. §281 expressly confirms that children of allotees qualify for B.I.A. education programs. This statute was apparently passed because allotment was at one time considered akin to termination. *See*, U.S. DEPT. OF THE INTERIOR, FEDERAL INDIAN LAW 276 (1958).

[133]*See also*, 25 U.S.C. §386a.

[134]*See also, supra* note 122, last paragraph.

[135]The act also includes 25 U.S.C. §§453 and 454. Section 452 determines beneficiaries, however

grants B.I.A. the power to contract with state and local governments, state schools, state corporations, and private organizations for the education, medical attention, agricultural assistance, and social welfare of "Indians." Not only does section 452 contain no limitation to reservation Indians, the committee reports recommending passage of the law state that it is intended to aid primarily "those states in which tribal life is largely broken up and in which Indians are to a considerable extent mixed with the general population."[136]

The contrary position of the B.I.A.[137] is untenable. It is based upon a 1950 report of the Senate Appropriations Committee,[138] which does indeed endorse a Bureau policy of basing Johnson-O'Malley assistance on financial need caused by the presence of large blocks of untaxable land.[139] With due deference to the Senate Appropriations Committee, however, a committee report written 16 years after the passage of the Johnson-O'Malley Act is of little if any significance in construing that law.[140]

Another set of laws under which all Indians (regardless of residence) qualify, if they have one quarter or more Indian blood,[141] is 25 U.S.C. §§470, 470a, and 471. Section 470 establishes a loan fund for economic development. By its terms this fund is revolving; that is, loan repayments are placed back in the fund rather than being payed into the United States Treasury.[142] Section 470a adds interest payments

[136]S.REP. No. 511, 73d Cong., 2d Sess. 1 (1934); H.REP. No. 864, 73d Cong., 2d Sess. 1-2 (1934).

[137]25 C.F.R. §§33.4(b); *but see* Memorandum Opinion M-35095, from Interior Department Solicitor Mastin G. White to the Secretary of the Interior, April 20, 1949, which states at 2:

> The primary purpose of the Johnson-O'Malley Act is to enable this Department to enlist the cooperation of States in rendering the social services mentioned in the act to Indians who are so intermingled with the general population of a state that it is not practical or economical for the Department to maintain separate services for them.

[138]House Hearings, pt. 6 at 104

[139]S.REP. No. 1941, 81st Cong., 2d Sess. (1950) at 135-136.

[140]*United States v. Southwestern Cable Co., supra* note 122 at 170; Remarks of Congressman Wendell Wyatt, House Hearings, pt. 6 at 106. Furthermore, the views of the Senate Appropriations Committee in 1950 would not be controlling in subsequent years. *Cf.* United States v. Vulte, 233 U.S. 509, 514-515 (1914).

[141]25 U.S.C. §§480, 482.

[142]When 25 U.S.C. §470 was enacted in 1934 as part of the INDIAN REORGANIZATION ACT, (I.R.A.) the only eligible borrowers were "Indian chartered corporations." 25 U.S.C. §470. That meant that borrowers could only be Indians living on a reservation (25 U.S.C. §476, 479) who voted to organize under the INDIAN REORGANIZATION ACT (25 U.S.C. §476, 478) and whose organization was chartered as on I.R.A. corporation by the Secretary of the Interior (25 U.S.C. §477). Indians in Alaska (which includes all Alaskan Natives, 25 U.S.C. §479), though generally excluded from the I.R.A., could avail themselves of section 470 (25 U.S.C. §473), if they lived on a reservation and organized under the I.R.A. (25 U.S.C. §§470, 476, 477, 478, 479). Indians in Oklahoma were outside the I.R.A. (25 U.S.C. §473) and so not eligible for section 470's loan fund. In 1936 25 U.S.C. §473a extended the benefits of section 470 to Indians in Alaska "not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well defined neighborhood, community, or rural district" and organized and chartered under sections 476 and 477. Also in 1936, 25 U.S.C. §507 authorized use of

and other charges to that fund.[143] Section 471 authorizes a separate loan fund for the tuition and other expenses of students in vocational and trade schools, high schools, and colleges.[144]

The remaining B.I.A. and I.H.S. authorization laws do not cover all unterminated Indians; but only some of those statutes distinguish between on and off-reservation Indians.[145]

25 U.S.C. §465 permits the Secretary of the Interior to purchase land for most individual Indians and some tribes. An individual Indian is a potential beneficiary if he does not live in Oklahoma[146] and if he is a member of a tribe[147] that was under federal jurisdiction on June 18, 1934, or is a descendant of such a member who was, on June 1, 1934, residing within the boundaries of an Indian reservation, or has one-half or more Indian blood.[148] A tribe is eligible, except in Oklahoma,[149] unless it voted against accepting the Indian Reorganization Act.[150] In Oklahoma a tribe is eligible only if it has voted to organize under the Oklahoma Welfare Act.[151]

25 U.S.C. §469 creates a fund to defray the expenses of organizing

---

section 470 loan funds by (1) "any recognized tribe or band of Indians residing in Oklahoma" that is organized and has a charter of incorporation issued by the federal government (25 U.S.C. §503) and (2) any local cooperative association of 10 or more Indians residing near each other in Oklahoma and having a charter from the Secretary of the Interior (25 U.S.C. §504). Finally in 1948, 25 U.S.C. §482 granted "tribes, bands, groups, and individual Indians, not otherwise eligible" the right to borrow funds under section 470.

[143]Section 470a was enacted in 1941. Eligible borrowers were persons entitled to borrow from the revolving loan fund plus, by virtue of 25 U.S.C. §506, individual Indians in Oklahoma. 25 U.S.C. §482 extended the benefits of section 470a to all other tribes, bands, groups and individuals.

25 U.S.C. §470a also appears to authorize creating a separate revolving loan fund out of the interest payments and other charges.

[144]Section 471 is one of the original parts of the INDIAN REORGANIZATION ACT. The original beneficiaries were individual Indians, including those in Alaska (25 U.S.C. §473) but excluding those in Oklahoma (25 U.S.C. §473). Oklahoma Indians except in Osage County (see 25 U.S.C. §508) are now eligible to borrow from the section 471 fund by virtue of 25 U.S.C. §507. Indians not considered Indians under the I.R.A. (25 U.S.C. §479 and see *supra* note 1) and ineligible because of 25 U.S.C. §508 are eligible Indians for purposes of section 471 under 25 U.S.C. §482.

Loans to high school and college students are limited under section 471 to $50,000 annually.

[145]Authorization laws that apply to one or two tribes or only in connection with a termination (*supra* note 118) are not discussed.

[146]Oklahoma Indians are excluded by 25 U.S.C. §473. However, except for those in Osage County, they benefit from a similar statute, 25 U.S.C. §501, which is discussed later in the text.

[147]As used in section 465 tribe means "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation."

[148]The restriction on which Indians qualify arises from the definition of Indian in 25 U.S.C. §479.

[149]25 U.S.C. §473. Alaska was originally excluded also (25 U.S.C. §473), but was later brought within the ambit of section 465 (25 U.S.C. §473a).

[150]25 U.S.C. §478; and *see* the definition of tribe, *supra* note 147. Land purchased for addition to an existing reservation is for the exclusive use of Indians entitled by enrollment or tribal membership to reside at that reservation.

[151]25 U.S.C. §§473, 503. And *see* 25 U.S.C. §501.

under the Indian Reorganization Act (I.R.A.). Outside of Alaska and Oklahoma, money from the fund can go to any reservation that has voted to organize under the I.R.A.[152] In Alaska money from the fund may be paid to any reservation or non-reservation organization formed under the I.R.A.[153] In Oklahoma any recognized tribe or band organized under the Oklahoma Welfare Act can obtain money under section 469.[154]

Two laws with express geographical limitations are 23 U.S.C. §203 and 25 U.S.C. §309. 23 U.S.C. §203 authorizes the B.I.A. to contract for the construction of "Indian reservation roads." 25 U.S.C. §309 (together with 25 U.S.C. §309a) authorizes the B.I.A. to undertake a program of vocational training "primarily" for Indians who "reside on or near an Indian reservation."[155]

Finally, certain laws authorize B.I.A. services only in Oklahoma or Alaska.

The statutes applying only to Oklahoma are 25 U.S.C. §§501, 506, and 507.[156] Section 501 empowers the B.I.A. to purchase agricultural and grazing lands in Oklahoma for any tribe, band, group, or individual Indian. Section 506 authorizes loans to individual Indians and to tribes, bands, and cooperative associations having charters from the Secretary of the Interior.[157] Section 506 also allows the B.I.A. to pay the costs of forming a cooperative association. Section 507 makes certain mineral royalties and other revenue[158] available for land purchases and loans. All of these laws were enacted because Oklahoma was originally excluded from the benefits of the Indian Reorganization Act.[159]

Five special authorization laws apply only to Alaska.[160] Of these,

[152]25 U.S.C. §469 does not expressly limit itself to reservation organizations. Outside of Alaska and Oklahoma, though, only reservations may organize under the I.R.A. 25 U.S.C. §§476, 479. Both section 469 and 25 U.S.C. §478 limit the fund to organizations formed under the I.R.A.

[153]25 U.S.C. §473a. A non-reservation group in Alaska may organize under the I.R.A. if it has "a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district."

[154]25 U.S.C. §503. Some other Oklahoma groups can receive money to organize under 25 U.S.C. §506. *See infra*, note 157 and accompanying text. Before 25 U.S.C. §503, Oklahoma Indians were excluded from the section 469 fund by 25 U.S.C. §473.

[155]Vocational training under section 309 may not exceed 24 months except in the case of nurses training which may be for 36 months. In addition to training itself, section 309 provides for counseling, transportation to the place of training, and subsistence during training.

[156]None of these laws affect Osage County, Oklahoma. 25 U.S.C. §508.

[157]Any recognized tribe or bank can secure a charter from the Secretary by voting to do so. 25 U.S.C. §503. A cooperative association is eligible for a charter if it consists of "ten or more Indians, as determined by the official tribal rolls, or Indian descendants of such enrolled members, or Indians as defined in section 479 of this title [25], who reside . . . in convenient proximity to each other." For the definition of Indian under 25 U.S.C. §479: *supra*, note 1.

[158]The revenues are those derived from mineral deposits under-lying lands purchased in Oklahoma pursuant to 25 U.S.C. §§465 and 501.

[159]25 U.S.C. §473; 79 CONG. REC. 13379 (Aug. 16, 1935).

[160]Act of February 20, 1942, c. 96, 56 Stat. 95; Act of January 27, 1905, c. 377, §7,

four relate to education. Two provide for the B.I.A. to educate Alaska Natives either in B.I.A. schools[161], or by contract with local school boards in Alaska.[162] A third law authorizes the B.I.A. to establish a vocational training system and to construct schools and dormitories.[163] The fourth law empowers the Bureau to withdraw small tracts of public domain for schools.[164] The latter two laws also authorize construction of hospitals[165] and withdrawals of small tracts for hospitals and other purposes necessary to the administration of Alaska Native affairs.[166] The fifth law allows the B.I.A. to buy food, clothing, and supplies with federal appropriations and sell the purchases to Alaska Natives and cooperatives under Interior Department supervision.[167]

The law authorizing withdrawal of small tracts was needed to circumvent other laws prohibiting the creation of Executive Order reservations.[168] The principal reasons for the other laws were the territorial status of Alaska at the time of their enactment[169] and uncertainty as to whether Indian laws applied to non-Indian Alaska Natives.[170] Other reasons for the laws existed also, however. The law permitting contracts with local school boards came before the Johnson-O'Malley Act, 25 U.S.C. §§452-454;[171] and no non-Alaskan counterpart exists for

---

33 Stat. 619; Act of May 14, 1930, c. 273, §1, 46 Stat. 321; Act of Feb. 25, 1925, c. 320, §1, 43 Stat. 978; 25 U.S.C. §497. The first four laws were formerly 48 U.S.C. §§50e, 169, 170a, and 173. They were deleted from title 48 at the time of Alaska statehood. *See* note at 31 of the Cummulative Pocket Part to Title 48 of the West Publishing Company's UNITED STATES CODE ANNOTATED (1972). They remained in force, however. 72 Stat. 339, §8d, as amended; 73 Stat. 141, §3, as amended. 25 U.S.C. §497 was once 48 U.S.C. §353a.

Section 2(c) of the ALASKA NATIVE CLAIMS SETTLEMENT ACT, 85 Stat. 688, directs the Secretary of the Interior to study the programs carried out under the five laws and to report to Congress by December 18, 1974, his recommendations for the "future management and operation" of the programs.

[161]Act of January 27, 1905, c. 277, §7, 33 Stat. 619. This law also provides that Alaska Natives are to be admitted to Indian boarding schools on the same basis as Indian children in other states.

[162]Act of May 14, 1930, c. 273, §1, 46 Stat. 321. This law also permits the B.I.A. to lease B.I.A. facilities to local school boards.

[163]Act of February 25, 1925, c. 320, §1, 43 Stat. 978.

[164]25 U.S.C. §497, Act of May 31, 1938, c. 304, 52 Stat. 593. Reserves created under 25 U.S.C. §497 and existing on December 18, 1971, were revoked, with certain exceptions, by section 19 of the ALASKA NATIVE CLAIMS SETTLEMENT ACT, 85 Stat. 688. However, under section 17(d) of the ALASKA NATIVES CLAIMS ACT the Secretary of the Interior could reestablish the reserves.

[165]Act of February 25, 1925, c. 320, §1, 43 Stat. 978.

[166]Act of May 31, 1938, c. 304, 52 Stat. 493. *Supra* note 164.

[167]Act of February 20, 1942, c. 96, 56 Stat. 95.

[168]H.REP. No. 1851, 75th Cong., 3d Sess. (1938) at 2; S.REP. No. 1767, 75th Cong., 3d Sess. (1938) at 2. The reports state that the law being avoided was section 4 of the Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C. §398d, but the real obstacle was section 2 of the Act of June 30, 1919, 41 Stat. 3 at 34, 43 U.S.C. §150.

[169]See S.REP. No. 954, 68th Cong., 2d Sess. (1925); H.REP. No. 528, 68th Cong., 1st Sess. (1925); H.REP. No. 25, 71st Cong., 2d Sess. (1930).

[170]See S.REP. No. 744, 58th Cong., 2nd Sess. (1905) at 8; *see also* the remarks of Congressman Cushman, 58 CONG. REC. 605-606 (January 9, 1905).

[171]The JOHNSON-O'MALLEY ACT was enacted in 1934, four years after the Act of May 14, 1930.

the statute allowing purchase and sale of food, clothing, and supplies.

Turning from authorization laws to appropriation acts leaves the legal picture substantially unchanged. P.L. 92-76,[172] which appropriates the money for B.I.A. and I.H.S. to carry out authorized programs in fiscal 1972, imposes geographical restrictions in only two situations. First, rewards may be paid solely in connection with crimes on "Indian reservations or lands." Second, the appropriation may not be used either to acquire land "outside of the boundaries of existing Indian reservations" in six states[173] or to acquire land or water rights "inside or outside the boundaries of existing reservations" in three other states.[174] The specific restriction of two programs to reservations in P.L. 92-76 and the specific restrictions in some authorization statutes—such as the "on or near" standard in 25 U.S.C. §309[175]—are strong evidence that Congress says so plainly when it wishes to circumscribe the locale of B.I.A. and I.H.S. operations. The conclusion follows that appropriations acts are not geographically restricting except for specific exceptions, like the two in P.L. 92-76.

This view is confirmed by a number of things. First, Congresswoman Julia Butler Hansen, Chairwoman of the House Subcommittee on Department of the Interior and Related Agencies Appropriations, recently said in a discussion of off-reservation Indians that appropriation bills from her committee have "never carried a limitation on expenditures concerning Indians."[176] Second, a recent report of Congresswoman Hansen's subcommittee states, "the Bureau can . . . assist Indians to adjust to city living."[177] Third, both the House and Senate reports on the 1972 B.I.A./I.H.S. appropriations law unequivocally indicate that part of that appropriation is to be used for an urban health project.[178] Manifestly, the reports would not do that if such an expenditure were illegal under the appropriations act. Fourth, both B.I.A.

[172]85 Stat. 229.

[173]The six states are Arizona, California, Colorado, New Mexico, South Dakota, and Utah. An exception is made for the Navajo Indian Irrigation Project.

[174]The three states are Nevada, Oregon, and Washington. An exception is granted for lands that may be necessary to replace the Wild Horse Dam in Nevada.

[175]25 U.S.C. §309 was limited to primarily those Indians living in or near reservations, because Congress believed both that more Indians were living on reservations than they could support and that relocation to cities was the only practical solution for that situation. S.REP. No. 2664, 84th Cong., 2d Sess. 2-3 (1956).

[176]House Hearings, pt. 6 at 107. Congresswoman Hansen also denied that her subcommittee had reached an informal agreement with Harrison Loesch for the B.I.A. to take a "hands-off" policy regarding urban Indians. *Id.* at 104.

[177]H.REP. No. 92-308, *supra* note 121 at 9. The entire quote is:

> The Committee believes that the Bureau of Indian Affairs should reassess its relationship to off-reservation Indians who now constitute 40% of the country's Indian population. While the Bureau's primary responsibility is to assist Indians living on reservations, the Bureau can and should do more to assist Indians to adjust to city living. Where practicable, referral and employment assistance services of the Bureau's area and field offices should be made available to any urban Indian requesting such services.

[178]*Id.* at 29; S.REP. No. 92-263, *supra* note 120 at 26.

and I.H.S. provide services to off-reservation Indians. As noted *supra*, I.H.S. maintains hospitals and clinics in urban areas[179] and will treat any Indian, regardless of residence, who comes to an I.H.S. facility.[180] B.I.A. serves Indians who live near reservations,[181] and also provides $2,000 down payments to urban Indians for up to five years after their relocation.[182] In other words, both B.I.A. and I.H.S. have shown by their actions that they believe service to off-reservation Indians, including urban Indians, is legal under recent appropriations acts.[183]

Of course, Congress intends that Indians living on or near reservations be the principal beneficiaries of present appropriations to the B.I.A. and I.H.S.[184] That is, the majority of B.I.A. and I.H.S. funds are destined for such Indians.

The determination of which funds are for which Indians must be based on an examination of appropriation hearings, committee reports, and discussions by the entire House and Senate, as well as on the law. Only occasionally does an appropriations act specify particular Indians who are to benefit from a share of an appropriation. Sometimes the reports make explicit that the committees want a certain reservation to get a certain amount of funds for a certain purpose.[185] Usually, though, the legislative intent is less clear. For instance, the B.I.A. may have detailed in the hearings exactly how much money it wishes in a particular category for particular reservations, the Bureau's witnesses may have provided the only testimony about the category, and Congress may have appropriated the amount requested by the B.I.A. In such circumstances, Congress probably intends for the appropriation in that category to be spent where the Bureau said it wishes to spend the money.[186] If, on the other hand, hearings and committee reports do not pinpoint beneficiaries in a particular category, reading geographic

[179] *See, supra* note 78.

[180] *See, supra* note 78 and accompanying text.

[181] *See, supra* notes 38-47 and accompanying text.

[182] *See, supra* note 69 and accompanying text. This program is clearly for urban Indians, because employment assistance to Indians on or near reservations under 25 U.S.C. §309 is limited to two years except in the case of nurses training, when the limit is three years. The five year program may and must be funded under authority of 25 U.S.C. §13. Even if down payments were made within the authorized training period, they would be hard to characterize as the "subsistence" authorized by section 309.

[183] An indication that the 1972 appropriations act carried a general geographic limit on B.I.A. activities is a statement in the Senate report that the appropriation would benefit "Indians under the jurisdiction of the Bureau of Indian Affairs living on or near reservations." S.REP. No. 92-263, *supra* note 120 at 5. That statement cannot be considered controlling in light of the large array of contrary indicators.

[184] S.REP. No. 92-263, *supra* note 120 at 5; H.REP. No. 92-308, *supra* note 121.

[185] An example of this is $387,000 for rehabilitation of a drought stricken area on the Papago Reservation. H.REP. No. 92-308, *supra* note 121 at 10; S.REP. No. 92-263, *supra* note 120 at 8.

[186] An example of this situation is the 1972 appropriation for construction of irrigation systems. *See*, Senate Hearings, pt. 1 at 730, 910-923, 946-947; House Hearings, pt. 2 at 1314-1327, 1412, 1414-1416.

If B.I.A. and non-B.I.A. witnesses present conflicting testimony, the situation is entirely different. For example, the B.I.A. stated in the hearings on the 1972 appro-

restrictions or perferences into the unrestricted language of an appropriations act would seem totally inappropriate.[187]

Regrettably, B.I.A. regulations are not wholly consistent with the will of Congress.[188] The most flagrant example is 25 C.F.R. §33.4(b) which provides that Johnson-O'Malley funds will go to school districts with "large blocks of non-taxable Indian owned property" rather than—as Congress intended[189]—to "those states in which tribal life is largely broken up and in which Indians are to a considerable extent mixed with the general population."

Other offending regulations are 25 C.F.R. §§22.3, 31.1 and 32.1. The first two deny B.I.A. boarding schools and contract care in private institutions to Indian children who do not live on or near reservations. Section 32.1 gives Indians residing on or near reservations a preference over other Indians for college loans and scholarships. All three regulations allow an Indian residing near a reservation to be a beneficiary only if not granting him or her contract care, boarding schooling, a scholarship, or a loan would have a "direct effect upon Bureau programs within the reservation."

The provisions of those regulations are illegal because they have no basis in 25 U.S.C. §§13, 452, and 471[190]—the laws which authorize contract care, boarding schools, college scholarships, and college loans.[191]

---

priation that *Johnson-O'Malley* funds could be paid only to school districts with blocks of tax-exempt Indian land. Senate Hearings, pt. 1 at 811; House Hearings, pt. 2 at 1164. Representative Donald Fraser testified to the contrary. House Hearings, pt. 6 at 101, 104, 105. Neither the appropriation law nor the committee reports attempted to resolve the conflict. Under such circumstances, a strong presumption exists that Congress followed its own rules. (RULES OF THE HOUSE OF REPRESENTATIVES, NINETY-SECOND CONGRESS, Rule XXI.2, H.Doc.No. 439, 91st Cong., 2d Sess. at 464-465 (1971); STANDING RULES OF THE SENATE, Rule XVI, S.Doc.No. 92-1, 92d Cong., 1st Sess., at 17 (1971)) and appropriated funds for the *Johnson-O'Malley* program in accordance with the program's authorization law. *Ex parte* Endo, 323 U.S. 283, 303, n. 24 (1944); D.C. Federation of Civic Associations v. Airis, 391 F.2d 478, 481-482 (D.C. Cir. 1968). The program's authorization law, 25 U.S.C. §452, clearly contemplated that off-reservation Indians would be the primary beneficiaries of *Johnson-O'Malley* money. *Supra* note 136 and accompanying text.

[187]College scholarships are a good example. The appropriations committees added $100,000 to the 1972 scholarship budget proposed by the B.I.A. but said nothing specifically about the residences of recipients. H.REP. No. 92-308, *supra* note 121 at 9; S.REP. No. 92-263, *supra* note 120 at 6. The B.I.A. also did not say anywhere in its testimony about college scholarships that they were only for reservation Indians or only for those Indians living on or near reservations. Senate Hearings, pt. 1 at 729, 743, 747, 784-785, 786, 787, 813-815; House Hearings, pt. 2 at 1067, 1078, 1108, 1111, 1150, 1159, 1160, 1162-1164. When specifically asked the criteria for college scholarships, Glenn Lundeen, Chief of Public School Relations for the B.I.A. replied, "Scholarship grants are made to Indian students with a quarter or more Indian blood who have graduated or who have a certificate of graduation from high school, and are desirous of entering college." Senate Hearings, pt. 1 at 813. On the legality of the quarter blood requirement, *see, supra* note 1.

[188]Provisions in the BUREAU'S INDIAN AFFAIRS MANUAL also purport to restrict the availability of B.I.A. services. *E.g.* 66 I.A.M. §3.1.4A.

[189]*Supra* note 136 and accompanying text.

[190]*Supra* notes 123-131, 135-144 and accompanying text.

[191]Boarding schools and scholarships are authorized by 25 U.S.C. §13, contract care by

Nor, if it is material, are the regulations issued contemporaneoously with the statutes of long standing. They date only from 1964 and 1968.[192] Before that 25 C.F.R. §§22.3 and 32.1 contained no geographical criteria,[193] and 25 C.F.R. §31.1 was limited only to "remote areas."[194]

I.H.S. regulations specify eligibility only for direct medical care.[195] Under 42 C.F.R. §36.12(a) an I.H.S. hospital or clinic will treat any person of Indian descent who "belong[s] to the Indian community served by the local facilities" and who is regarded as an Indian by the community in which he or she lives.[196] Belonging to the Indian community served by the local facilities apparently does not require reservation residence,[197] although the criteria for determining who is regarded as an Indian by the community in which one lives are skewed in favor of reservation residents.[198] As between eligible individuals, however, priority for service is based on "relative medical need and access to other arrangements,"[199] not upon on or off-reservation residence.

The citizenship of off-reservation Indian does not render those Indians ineligible for B.I.A. and I.H.S. services. All Indians are citizens of the United States[200] and the state where they reside.[201] Similarly off-reservation Indians cannot be ineligible for B.I.A. and I.H.S. programs just because they receive services from other federal agencies and state and local governments.[202] Reservation Indians receive ex-

---

25 U.S.C. §452, and college loans by 25 U.S.C. §471. Contrary to statements in the federal register, 5 U.S.C. §301 does not authorize contract care, 25 U.S.C. §§282 and 295 do not authorize boarding schools, and 25 U.S.C. §471 does not authorize scholarships. 5 U.S.C. §301 and 25 U.S.C. §295 authorize no substantive programs. *Cf.* Organized Village of Kake v. Egan, 369 U.S. 60, 63 (1962). 25 U.S.C. §282 authorizes the B.I.A. to compel attendance by "eligible Indian children who are wards of the Government" in B.I.A. or public schools but does not authorize the schools themselves. Moreover, even if 25 U.S.C. §282 were deemed to authorize schools, the class of eligible Indian wards is either all Indians or no Indians. *See, supra* notes 92-97, 127, 183. 25 U.S.C. §471 authorizes only loans.

[192]29 FED. REG. 5828 (May 2, 1964); 33 FED. REG. 6473 (April 27, 1968); 33 FED. REG. 6968 (May 9, 1968); 33 FED. REG. 9708 (July 4, 1968).

[193]22 FED. REG. 10532 (December 24, 1957); 22 FED. REG. 10533 (December 24, 1957).

[194]22 FED. REG. 10533 (December 24, 1957).

[195]42 C.F.R. Part 36.

[196]The regulations also declare non-Indian wives (and presumably non-Indian husbands) eligible for health care. 42 C.F.R. §36.12(a)(1). Such service to non-Indians is unauthorized. Compare 25 U.S.C. §13 and 42 U.S.C. §2001 with 25 U.S.C. §§288 and 289; *but see* Scholder v. United States, 428 F.2d 1123, 11-28-1129 (9th Cir. 1970), cert. denied 400 U.S. 942 (1970).

[197]See text *supra* at note 78.

[198]The criteria specified in 42 C.F.R. §36.12(a)(2) are "tribal membership, enrollment, residence on tax-exempt land, ownership of restricted property, active participation in tribal affairs, or other relevant factors in keeping with general Bureau of Indian Affairs practices within the jurisdiction."

[199]42 C.F.R. §36.12(c). Indians who are able to pay for health services may be required to do so. 42 C.F.R. §36.12.

[200]8 U.S.C. §1401(a)(2).

[201]Prowd v. Grove, 57 Cal. App. 458, 460 (1922).

[202]Eligibility for state services has also been used as the basis for denying B.I.A. and I.H.S. services to so-called non-federal, reservation Indians. Memorandum from Ellen

Participation by Off-reservation Indians

tensive benefits from other federal programs,[203] and, contrary to B.I.A. pronouncements,[204] state and local governments not only can and do serve[205] but must serve reservation Indians.[206] State and local governments are not excused from serving reservation Indians because Indian land is tax-exempt.[207]

Finally, 18 U.S.C. §1151 does not determine which Indians are eligible for B.I.A. and I.H.S. services. The opposite view of the B.I.A.[208] is preposterous. Title 18 of the United States Code is concerned with

---

Checots, Special Projects Section, Tribal Operations, B.I.A., to Associate Commissioner, B.I.A., re Status of the New York Indian Reservations With Respect to Federal Jurisdiction at 28-29 of the Appendix (January 27, 1965). The practice is no more legal than in the case of off-reservation Indians.

Denial of B.I.A. and I.H.S. services may not be justified either on the ground that the United States does not hold legal title to state reservations. The United States does not hold legal title to many pueblos (UNITED STATES DEPT. OF THE INTERIOR, FEDERAL INDIAN LAW 918), yet all pueblos receive B.I.A. services without special authorization laws (*Id.* at 909). *See also,* O'Toole & Tureen, *State Power and the Passamaquody Tribe: "A Gross National Hypocrisy?,"* 23 MAINE L.REV. 1 at 6, 39 (1971); *cf.* Stockbridge Munsee Community v. United States, 25 Ind.Cl. Comm. 281 (1971).

[203]S.REP. No. 92-263, *supra* note 120 at 5. In fact, programs funded by agencies other than B.I.A. and I.H.S. are easier to establish for reservation Indians than for off-reservation Indians. 42 U.S.C. §2000d prohibits racial discrimination by federally funded programs other than B.I.A. and I.H.S. but allows programs that serve only one area—such as a reservation. *See also,* Responses of Robert Robertson, Executive Director, National Council on Indian Opportunity, to Questions by Senator Charles Percy, Senate Hearings, pt. 2 at 1472; Testimony of Iric Nathanson, member of Congressman Donald Fraser's staff, House Hearings, pt. 6 at 106.

[204]House Hearings, pt. 2 at 1140-1141.

[205]McClanahan v. State Tax Commission of Arizona, 14 Ariz. App. 452, 174 P.2d 221 (1971), appeal pending to Supreme Court of the United States.

[206]Acosta v. San Diego County, 126 Cal.App. 2d 455, 272 P.2d 92 (1954); State Board of Public Welfare v. Board of Commissioners of Twain County, 262 N.C. 745, 478, 137 S.E. 2d 801, 802-803 (1964); UNITED STATES DEPT. OF THE INTERIOR, FEDERAL INDIAN LAW 540, n. 6 (1958).

County of Beltrami v. County of Hennepin, 264 Minn. 406, 119 N.W. 2d 25 (1963), is not to the contrary. The question in that case was whether Hennepin County or Beltrami County was required to make general relief welfare payments to Indian children who became ineligible for Aid to Families with Dependent Children (A.D.C.) sometime after moving, while on A.D.C., from the Red Lake Reservation in Beltrami County to Hennepin County. State law imposed liability for general relief on the county in which the children had their "settlement." Hennepin was not their place of settlement under the Minnesota poor-relief laws, because the children moved there while receiving A.D.C. Beltrami County was not their settlement, concluded the court, because a settlement could not legally be a place, such as the Red Lake Reservation, where a county was unable to carry out the state imposed duty of enforcing the recipients' obligations under the general relief laws. The court ruled that denying the children settlement on the reservation did not violate the Constitutional guarantee of equal protection, because, as unsettled persons, the children were entitled to general relief from Hennepin County, where they lived. The court did not suggest that Beltrami County could constitutionally deny general relief to a permanent resident of the Red Lake Reservation.

[207]Acosta v. San Diego County, *supra* note 206. Moreover, Arizona has ruled that a Navajo who lives and works on the Navajo Reservation must pay Arizona income tax. *McClanahan v. State Tax Commission of Arizona, supra* note 205; *but see Commission of Taxation v. Brun,* 286 Minn. 43, 174 N.W. 2d 120, 126 (1970). The federal government also pays part of the cost of state services to reservation Indians. 20 U.S.C. §§236-244 (education); UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SOCIAL AND REHABILITATION SERVICE, STATE LETTER NO. 1062 (March 3, 1969) (welfare).

[208]Testimony of B.I.A. Commissioner Louise Bruce, House Hearings, pt. 2 at 1095.

crimes. Section 1151 by its own terms defines "Indian Country" only as that phrase is used in the chapter of title 18 which allocates criminal jurisdiction between reservation governments, states, and the federal government. Different factors are relevant to the allocation of criminal jurisdiction and the provision of services. In any event, the laws in titles 23, 25, 42, and 48 authorizing B.I.A. and I.H.S. services do not refer to "Indian Country."

JUSTICE DEMANDS THAT THE B.I.A. AND I.H.S. SERVE OFF-RESERVATION INDIANS

Congress recognizes that reservation Indians need special services not provided to other citizens.[209] Reservation Indians are extremely poor,[210] have exceptionally bad health,[211] often do not speak English, and sometimes fail to receive state services to which they are entitled.[212]

The situation for off-reservation Indians is the same. They are extremely poor.[213] They have critical, unmet health needs.[214] They lack decent housing.[215] They have special education needs,[216] may not speak English[217] and have cultural patterns that impede dealings with non-Indian agencies.[218] Off-reservation Indians in cities frequently feel trapped in an urban maze.[219]

Some states apparently do not serve off-reservation Indians.[220] Others provide inadequate service.[221] Many cities deny services to Indians on the ground that they are eligible for B.I.A. and I.H.S. serv-

[209]S.REP. No. 92-263, *supra* note 120 at 5; H.REP. No. 92-308, *supra* note 121 at 9.

[210]BROPHY AND ABERLE, THE INDIAN: AMERICA'S UNFINISHED BUSINESS 68-70 (1966).

[211]*E.g.*, House Hearings, pt. 4 at 992-995.

[212]Testimony of Emery Johnson, Director, I.H.S., and remarks of Congresswoman Julia Butler Hansen, House Hearings, pt. 4 at 1082.

[213]JOHNSON, AMERICAN INDIANS IN RURAL POVERTY IN TOWARD ECONOMIC DEVELOPMENT FOR NATIVE AMERICAN COMMUNITIES, *supra* note 11; RURAL INDIAN AMERICANS IN POVERTY, *supra* note 8 at 11; President Nixon's Message to Congress on Indian Affairs of July 8, 1970 at 10 ("Three-fourths [of urban Indians] are living in poverty"); Letter from Senator Adlai E. Stevenson III to Secretary of the Interior, Rogers C.B. Morton, Nov. 3, 1971.

[214]RURAL INDIAN AMERICANS IN POVERTY, *supra* note 8 at 11; Testimony of Senator Fred Harris, Senate Hearings, pt. 3 at 3074; Testimony of Representative Donald Fraser, House Hearings, pt. 6 at 106; Price, *The Migration and Adaption of American Indians to Los Angeles*, *supra* note 75.

[215]Decent Homes: A Report on the Need for An Emergency Housing Grant for Rural California Indians in Senate Hearings, pt. 3 at 3327-3330; RURAL AMERICAN INDIANS IN POVERTY, *supra* note 8 at 11; Letter of November 3, 1971, from Senator Stevenson to Secretary Morton, *supra* note 213 at 4.

[216]S.REP. No. 92-384, 92d Cong., 1st Sess. (1971) at 5.

[217]Testimony of B.I.A. Commissioner Louis Bruce, Senate Hearings, pt. 1 at 755.

[218]*Id.* at 755-756; Testimony of Ladonna Harris, Senate Hearings, pt. 3 at 3272.

[219]Testimony of Senator Fred Harris, Senate Hearings, pt. 3 at 3074.

[220]Remarks of Congresswoman Julia Butler Hansen, House Hearings, pt. 6 at 387. That practice is unconstitutional, of course. *Supra* notes 186-189, and accompanying text.

[221]Testimony of J. Alan Galbraith, Senate Hearings, pt. 3 at 3324-3325. No state can meet the enormous need to provide Indians with college scholarships, for instance.

ices.[222] Off-reservation "Indians also face a certain amount of discrimination because they are Indians. . . . [T]here are instances where States are interested in having the Indians return to their reservations."[223]

Federal agencies other than the B.I.A. are reluctant or unable to establish Indian programs.[224] Non-Indian programs of those other agencies are sometimes inadequate to deal with Indian needs.[225] Programs of the Office of Economic Opportunity are not an entirely satisfactory alternative to those of B.I.A. and I.H.S., because OEO programs lack the assured continuity of B.I.A. and I.H.S. programs.[226]

In other words, off-reservation Indians, like on-reservation Indians, need B.I.A. and I.H.S. services in areas such as education, housing, and health care, though not to the exclusion of services by cities, states, and other federal agencies; and B.I.A. and I.H.S. already have offices and facilities in off-reservation areas.[227]

Congress, the Bureau of Indian Affairs, and the Indian Health Service should not decline to furnish the special services needed by off-reservation Indians. Off-reservation Indians are off-reservation largely because of actions taken by the Congress and the B.I.A.

Many Indians never received reservations. California Indians, for instance, surrendered most of their land in accordance with their promises in treaties; but the Government did not carry out its promises to establish 8½ million acres of reservations, because gold miners and the California Legislature induced the U.S. Senate not to ratify the treaties.[228] The rest of the California Indians' land was lost when they did not comply with an 1851 title registration act which they never

[222]Testimony of Ernest Stevens, Director of Community Services, B.I.A., Senate Hearings, pt. 1 at 758, 937; Testimony of Senator Fred Harris, Senate Hearings, pt. 3 at 3074-3075; Testimony of Ernest Stevens, House Hearings, pt. 2 at 1144. Whether urban Indians are eligible for or do receive B.I.A. and I.H.S. services is legally irrelevant in determining their eligibility for city services. *Supra* notes 186-189 and accompanying text.

[223]Remarks of Congresswoman Julia Butler Hansen, House Hearing, pt. 4 at 1083.

[224]Statement of Congressman Donald Fraser, House Hearings, pt. 6 at 103; *See also*, discussion *supra* note 203.

[225]B.I.A. Appropriation Justification Statement, Senate Hearings, pt. 1 at 797.

[226]Remarks of Congresswoman Julia Butler Hansen, House Hearings, pt. 4 at 1087.

[227]Information supplied by I.H.S., House Hearings, pt. 4 at 1103; I.H.S. News Release of December 16, 1970, in House Hearings, pt. 6 at 78; Testimony of Representative Donald Fraser, House Hearings, pt. 6 at 107 The B.I.A. says it has difficulty in keeping in contact with off-reservation Indians (Senate Hearings, pt. 1 at 48, 755), but it would not have that problem if it told Indians they could receive assistance at Bureau offices (Responses of Robert Robertson, Executive Director, National Council on Indian Opportunity to questions by Senator Charles Percy, Senate Hearings, pt. 2 at 1470).

Moreover, if an off-reservation Indian is denied B.I.A. and I.H.S. service, he can return to his reservation, if he is from one, and receive B.I.A. and I.H.S. services. Senate Hearings, pt. 1 at 759; House Hearings, pt. 2 at 1143.

[228]KENNY, HISTORY AND PROPOSED SETTLEMENT—CLAIMS OF CALIFORNIA INDIANS 3, 7-19, (1944).

heard of and could not have read in any event.[229] Congress did provide California Indians with a number of small reservations in the late nineteenth and early twentieth centuries.[230] Those reservations were largely waste lands however,[231] and they accommodate only a small fraction of the California Indians.[232]

Nevada Indians also have outgrown some tiny reservations established for them.[233]

Large numbers of Indians are landless because of the Government's allotment program. First, substantial parts of reservations were sold to non-Indians, after Indians were alloted 40 to 160 acre trust parcels.[234] Then, when the allotments failed to yield a living income, Indians had to sell their land in order to avoid starvation.[235] At least two million acres were lost in that manner.[236]

Another way the government has given Indians off-reservation status is to take large, valuable parts of their reservations.[237] This forces Indians to move to harsh, barren lands[238] and must eventually lead many people to leave reservations entirely.

Termination, though no longer an official policy,[239] has ended not only reservation status but also Indian status (in the eyes of the law) for thousands of Indians.[240]

Other thousands of Indians[241] are considered off-reservation because, through accidents in the historical maturation of the United States, their reservations developed special relationships with state governments.[242]

[229] *Id.* at 19-21.
[230] *Id.* at 23.
[231] *Id.*
[232] Senate Hearings, pt. 1 at 753.
[233] Remarks of Senator Bible, 117 CONG. REC. S2409 (March 4, 1971).
[234] CALIFORNIA INDIAN LEGAL SERVICES, HOW CALIFORNIA WAS TAKEN FROM THE INDIANS (April, 1971).
[235] CAHN, OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA 75 (1969); THE INDIAN: AMERICA'S UNFINISHED BUSINESS, *supra* note 210 at 72-73.
[236] *Id.*
[237] Our Brother's Keeper, *supra* note 235 at 69-73.
[238] *Id.* at 71.
[239] President Nixon repudiated termination in his Message to Congress on Indian Affairs of July 8, 1970. H.Con.Res. 108 (83d Cong., 1st Sess., 1953) put the 83d Congress on record as favoring termination, but being only a concurrent resolution, H.Con.Res. 108 died with the Congress that passed it. This was acknowledged by the B.I.A. as long ago as 1961. Letter from Secretary of the Interior Stuart Udall to Richard Schifter, General Counsel, Association on American Indian Affairs, April 15, 1961.
[240] *See, Supra* note 115. For the B.I.A. and I.H.S. to serve terminated Indians would require a change in the law, of course, since terminated Indians are legally non-Indians as well as off-reservation. The necessary legislation should be adopted as soon as possible, because the needs of terminated Indians for special Indian services are, if anything, greater than the needs of unterminated Indians for such services. S.REP. No. 92-384, *supra* note 216 at 5.
[241] *See* material cited, *supra* note 6.
[242] *See, e.g.*, the discussion of New York Indians in UNITED STATES DEPARTMENT OF THE INTERIOR, FEDERAL INDIAN LAW 965-979 (1958).

Lastly, the B.I.A. encouraged, if it did not actually coerce, several hundred thousand Indians[243] to move to urban areas.[244]

Congress and the B.I.A. cannot say in good conscience that denying needed B.I.A. and I.H.S. services to off-reservation Indians is morally consistent with the government actions which turned so many Indians into off-reservation Indians.[245]

CONCLUSION

The Bureau of Indian Affairs and the Indian Health Service now serve reservation, off-reservation rural, and urban Indians. The laws empower B.I.A. and I.H.S. to serve all unterminated Indians, and they should do so. Congress should enact new laws permitting B.I.A. and I.H.S. to serve terminated Indians, should appropriate sufficient funds to meet the needs of all Indians, and should clearly direct the B.I.A. and I.H.S. to meet their moral and trust obligations by serving all Indians everywhere in the nation.

Whether Congress, the B.I.A., and the I.H.S. will do as they should remains to be seen. Senator Henry Jackson, Chairman of the Senate Committee on Interior and Insular Affairs, recently acknowledged that "unwarranted importance . . . has been attached to geography as a major criteria in determining Indians' entitlement to the special Federal Indian service programs of the Bureau of Indian Affairs and the Indian Health Service."[246] At the same time, however, Senator Jackson sponsored and the Senate passed a resolution intended to define B.I.A. and I.H.S. service areas as "on or near reservations."[247] The hearings, reports,

[243]*See, supra* note 9 and accompanying text; see text *supra* at notes 70-75.

[244]Testimony of Congressman Donald Fraser, House Hearings, pt. 6 at 100, 101, 104; Testimony of Senator Fred Harris, Senate Hearings, pt. 3 at 3074.

[245]The availability of B.I.A. and I.H.S. services to off-reservation Indians should not be the cause for a mass movement of Indians from reservations to urban areas Some Indians would probably move off-reservation if B.I.A. and I.H.S. benefits were equally available to on and off-reservation Indians, but such changes in residence would be consistent with the concept that Indians should be free to determine where they will live without regard to B.I.A. and I.H.S. benefits. *Cf.* Shapiro v. Thompson, 394 U.S. 618 (1969).

[246]117 CONG. REC. S21327 (December 11, 1971).

[247]The resolution is S.Con.Res. 26. It provides in relevant part:

> Whereas it is recognized by the Congress that the American Indian stands in a unique legal, social, and economic relationship to the Federal Government which is based upon the constitution, treaties, statutes, Executive orders, agreements, judicial decisions, and history; and
> Whereas it is further recognized that this unique relationship is the basis for the Federal responsibility to . . . provide basic community services to American Indians residing on reservations and in other areas considered to be within the scope of the trust relationship . . .
> Now therefore be it Resolved by the Senate (the House of Representatives concurring), that it is the sense of Congress that—
> (4) there should be a recognition of Federal responsibility to see that those Indians residing beyond the areas served by special Indian programs and services are given equal consideration with other citizens in the provision of services by other Federal, State and local agencies.
> (5) . . . Congress will commit and dedicate itself to support a policy of developing the necessary programs and services to bring Indians to a social and economic level of full participating citizens.

debates, and action on the fiscal 1973 B.I.A. and I.H.S. appropriations should shed a great deal more light on Congress' intentions.

Court decisions will also affect future relations between off-reservation Indians and the federal government. Already two lawsuits challenge the legality[248] and constitutionality[249] of denying B.I.A. services to off-reservation Indians. Unless the B.I.A. and the I.H.S. change their practices, additional cases may be expected from other off-reservation Indians who became "dependent people"[250] when "the United States overcame the Indians and took possession of their lands."[251]

The report of the Interior and Insular Affairs Committee and remarks of Senator Jackson on the floor of the Senate show that "Indians residing on reservations and in other areas considered to be within the scope of the trust relationship" was intended to be the opposite of "Indians residing beyond the areas served by special Indian programs" and that the former phrase was intended to mean "on or near reservations." S.REP. No. 92-561, 92d Cong., 1st Sess. (1971) at 3; 117 CONG. REC. S21326 (December 11, 1971).

Even if the House passes S.Con.Res. 26, the resolution will not have any significance after the end of the 92d Congress. See remarks of Senator Allott, 117 CONG. REC. S21326 (December 11, 1971); *See also*, discussion *supra* note 239.

[248]*See*, cases cited *supra* note 131.

[249]Congress' "plenary" power over Indian affairs is subject to Constitutional limitations. Perrin v. United States, 232 U.S. 478, 486 (1914); Stevens v. Cherokee Nation, 174 U.S. 445, 478 (1899); Fort Berthold Reservation v. United States, 390 F.2d 686 (Ct.Cl. 1968); Note, *Red, White and Gray: Equal Protection and the American Indian*, 21 STAN. L.REV. 1236, 1247-1248 (1969); 82 HARV. L.REV. 697, 700, n. 17 (1969); Kane, *The Negroe and the Indian: A Comparison of Their Constitutional Rights*, 7 ARIZ. L.REV. 244, 248 (1966); *cf.* Memorandum for the Assistant Secretary of the Interior from the Office of the Solicitor, Department of the Interior re admission of Indians to St. Elizabeth's Hospital, July 27, 1939; Regina v. Drybones, 9 D.L.R. 3d 473 (1969). If only certain classes of Indians are to receive federal benefits, the classification scheme must be reasonable, not arbitrary.

Ruiz v. Hickel, *supra* note 131, claims that the distinction between on and off reservation Indians is arbitrary with respect to B.I.A. welfare. Croy v. Morton, *supra* note 131, makes the same claim with respect to B.I.A. housing. Those claims would seem to be meritorious when the need of off-reservation Indians is as great as the need of on-reservation Indians. The moral claims of the two groups are hardly distinguishable. In fact, Indians who never received reservations have, if anything, a greater moral claim than those who did. Neither can off and on-reservation Indians be distinguished on concepts of trust status, treaty rights, citizenships, or the right to state and local services. And on-reservation Indians may more easily avail themselves of federal programs. *See*, discussion *supra* note 203.

The power to make eligibility for Indian programs turn on a minimum quantum of Indian blood (*cf.* Simmons v. Eagle Seelatsee, 244 F.Supp. 808 (E.D. Wash. 1965), affirmed per curiam 384 U.S. 209) does not carry with it the power to arbitrarily discriminate between on and off-reservation Indians. The amount of Indian blood required to be an Indian is necessarily arbitrary; the determination of whether on-reservation Indians, off-reservation Indians, or both groups should receive B.I.A. and I.H.S. services can be decided on the basis of the factors listed in the preceeding paragraph.

[250]Board of Commissioners of Creek County v. Seber, 318 U.S. 705, 715 (1943).

[251]*Id.*

APPENDIX A

U.S. Department of the Interior
Bureau of Indian Affairs
Statistical Division
July 1971

ESTIMATES OF THE INDIAN POPULATION SERVED BY THE BUREAU OF INDIAN AFFAIRS: MARCH 1971

The attached tables provide population estimates of Indians resident on, or adjacent to, Federal reservations. Table 1 reports the population for each of the 25 reservation States, and also for each of the 12 regional administrative units of the Bureau. Table 2 shows total Indian population for individual reservations, grouped by State. The reservation name is listed first, followed by the name of the Agency office with Bureau jurisdiction. Reservations crossing State lines are listed under the State where the majority reside. However, the population is prorated among the States to arrive at the State totals in Table 1.

Who is an Indian? The statistics here pertain to what might be called "administrative" or "official" Indians who are eligible for services from the Bureau of Indian Affairs. Generally speaking, they are members of tribes with Federal trust land, who have one-quarter or more Indian blood and who live on a Federal reservation or nearby. Other definitions of "Indian" are possible—for example, the Census Bureau employs a cultural definition, counting persons who report themselves as Indian (or who are so regarded by the community) regardless of tribe or residence. Different definitions lead to different statistics, so there is no one answer to the question, "How many Indians are there?"

These tables do not include all Indians in the United States. They exclude Indians who are not members of tribes with trust land under Federal jurisdiction and members of such tribes no longer living on or adjacent to Federal reservations.

Special legislation governs eligibility in Alaska and Oklahoma. In Alaska, the figures include all Alaskan Natives—that is to say, Aleuts and Eskimos as well as American Indians. Very few are living on reservations, and the term "adjacent" refers to all the rest of Alaska. In Oklahoma, the area covered is composed of former reservations. In both States, the Bureau's responsibility extends to the population shown in the table.

The population resident within the reservation boundaries may include many non-Indian people. However, only Indians are counted in the tables.

The statistics are labeled "Estimates" because they are not based to any major extent on actual population surveys as of the given date. The figures for each reservation are supplied by the local staff, using the data sources available. Some sources are very accurate, such as the membership lists maintained by some tribes, but other sources are less so. Generally speaking, data for the Navajo Area, the State of Oklahoma (Anadarko Area and Muskogee Area), and the State of Alaska (Juneau Area) are considered the least accurate and the most difficult to improve because of the large population scattered over enormous areas.

Table 1. ESTIMATES OF INDIAN POPULATION ON OR ADJACENT TO FEDERAL RESERVATIONS, BY STATE AND AREA: MARCH 1971
(includes Alaska Natives)

Bureau of Indian Affairs Total 488,000

State			
Alaska [1/]	59,000	Nebraska	2,300
Arizona	114,400	Nevada	4,700
California	7,300	New Mexico	77,400
Colorado	1,800	North Carolina	4,800
Florida	1,500	North Dakota	14,400
Idaho	5,100	Oklahoma [2/]	86,600
Iowa	500	Oregon	2,800
Kansas	900	South Dakota	30,800
Louisiana	300	Utah	6,100
Michigan	2,000	Washington	17,100
Minnesota	11,000	Wisconsin	7,200
Mississippi	3,200	Wyoming	4,300
Montana	22,500		

Administrative Area

Aberdeen Area	47,400	Muskogee Area	65,900
Albuquerque Area	27,300	Navajo Area	130,200
Anadarko Area	21,800	Phoenix Area	48,900
Billings Area	26,800	Portland Area	24,800
Juneau Area	59,000	Sacramento Area	5,400
Minneapolis Area	20,700	Central Office	9,800

NOTE: Details may not add to totals because of rounding. Adjustments made for the States where reservations overlap into another State.

[1]/ Includes all Indians and Natives in Alaska.

[2]/ Includes former reservation areas in Oklahoma.

Statistical Division
July 1971

Table 2. ESTIMATES OF INDIAN POPULATION ON OR AJACENT TO FEDERAL RESERVATIONS, BY RESERVATION: MARCH 1971

State and Reservation	BIA Agency	Indian Population
ALASKA (Includes all Indians and Natives.)		
Anchorage District, Anchorage		16,740
Bethel District, Bethel		12,690
Fairbanks District, Fairbanks		9,100
Nome District, Nome		9,600
Southeast District, Southeast		10,900
ARIZONA		
Ak-Chin (Maricopa), Pima		250
Camp Verde, Truxton Canyon		690
Cocopah, Colorado River		430
Colorado River, Colo. River		1,840
Fort Apache, Fort Apache		6,140
Fort McDowell, Salt River		340
Gila Bend, Papago		250
Gila River, Pima		8,310
Havasupai, Truxton Canyon		370
Hopi, Hopi		6,280
Hualapai, Truxton Canyon		1,040
Kaibab, Hopi		140
Navajo: Total, Navajo Area		(128,120)
Arizona part, Navajo Area		73,660
Papago, Papago		6,740
Salt River, Salt River		2,410
San Carlos, San Carlos		4,690
San Xavier, Papago		680
Yavapai, Truxton Canyon		90
(See also Ft. Yuma listed in Calif.)		
CALIFORNIA		
Agua Caliente, Palm Springs		100a
Alturas, California		L
Barona Ranch, Riverside		100a
Big Bend, Hoopa		10a
Big Pine, California		50a
Big Sandy, California		40a
Bishop, California		500a
Cabazon, Riverside		10
Cachil Dehe (Colusa), California		10
Cahuilla, Riverside		20
Campo, Riverside		30
Cedarville, California		10
Chemehuevi, Colo. River		30
Cold Springs, California		30
Dry Creek, California		10a
Enterprise, California		L a
Fort Bidwell, California		30
Fort Independence, California		60a
Fort Mohave, Colo. River		340
Fort Yuma, Colo. River		1,250b
Grindstone Creek, California		10
Hoopa Valley Extension, Hoopa		150a
Hoopa Valley, Hoopa		1,490
Inaja & Cosmit, Riverside		10a
Jackson, California		L a
La Jolla, Riverside		20
Laytonville, California		60a
Lone Pine, California		120a
Lookout, California		L a
Los Coyotes, Riverside		40
Manchester, California		60a
Manzanita, Riverside		L
Middletown, California		20a
Montgomery Creek, Hoopa AFO		L a
Morongo, Riverside		240
Pala, Riverside		260
Pauma & Yuima, Riverside		60
Pechanga, Riverside		20
Rincon, Riverside		90a
Roaring Creek, Hoopa		L a
Round Valley, California		350a
Rumsey, California		L a
San Manuel, Riverside		20
San Pasqual, Riverside		20
Santa Rosa, California		200
Santa Rosa, Riverside		L
Santa Ynez, Riverside		40
Santa Ysabel, Riverside		110a
Sheep Ranch, California		L a
Soboba, Riverside		180
Stewart's Point, California		40
Sulphur Bank, California		80
Susanville, California		110
Sycuan, Riverside		30
Torres-Martinez, Riverside		40
Trinidad, Hoopa		30a
Tule River, California		320
Tuolumne, California		60
Viejas (Baron Long), Riverside		100a
Woodfords Community, Nevada		250
XL-Ranch, California		30a
COLORADO		
Southern Ute, Southern Ute		690a
Ute Mountain, Ute Mountain		1,350c
FLORIDA		
Big Cypress, Seminole		340
Brighton, Seminole		320
Hollywood (Dania), Seminole		410
Miccosukee, Miccosukee		430

State and Reservation	BIA Agency	Indian Population
IDAHO		
Coeur d'Alene,	Northern Idaho	480
Fort Hall,	Fort Hall	3,040
Kootenai,	Northern Idaho	50
Nez Perce (Lapwai),	No. Idaho	1,300
(See also Duck Valley listed in Nevada.)		
IOWA		
Sac & Fox,	Sac & Fox Office	550
KANSAS		
Iowa,	Horton	260d
Kickapoo,	Horton	250
Potawatomi,	Horton	490
Sac & Fox,	Horton	20e
LOUISIANA		
Chitimacha (est.),	Choctaw	270
MICHIGAN		
Bay Mills,	Great Lakes	1,000
Hannahville,	Great Lakes	170
Isabella (Saginaw),	Great Lakes	430
Keweenaw Bay (L'Anse and Ontonagon) ,	Great Lakes	390
MINNESOTA		
Fon du Lac,	Minnesota	740
Grand Portage,	Minnesota	210
Leech Lake,	Minnesota	2,800
Lower Sioux,	Minnesota	110
Mille Lac,	Minnesota	800
Nett Lake,	Minnesota	680
Prairie Island,	Minnesota	90
Prior Lake,	Minnesota	20
Red Lake,	Red Lake	2,760
Upper Sioux,	Minnesota	80
White Earth,	Minnesota	2,660
(See also Winnebago listed in Wisconsin.)		
MISSISSIPPI		
Choctaw,	Choctaw	3,180
MONTANA		
Blackfeet,	Blackfeet	6,160
Crow,	Crow	4,100
Flathead,	Flathead	2,830
Fort Belkamp,	Fort Belknap	1,780
Fort Peck,	Fort Peck	3,990
Northern Cheyenne, (Tongue River)	Northern Cheyenne	2,490
Rocky Boys,	Rock Boys	1,180
NEBRASKA		
Omaha,	Winnebago	1,100
Santee,	Winnebago	240
Winnebago,	Winnebago	880
(See also Iowa and Sac & Fox listed in Kansas.)		
NEVADA		
Battle Mountain & City,	Nevada	160
Carson,	Nevada	160a
Elko & city,	Nevada	330
Ely & city,	Nevada	160
Dresserville,	Nevada	150
Duck Valley,	Nevada	880f
Duckwater,	Nevada	80
Fallon (Paiute) & colony,	Nevada	220
Fort McDermitt,	Nevada	380
Goshute,	Nevada	160g
Las Vegas,	Nevada	100a
Lovelack,	Nevada	120a
Moopa River,	Nevada	140
Nevada Public Domain & allotments,	Nevada	20
Pyramid Lake,	Nevada	410
Reno Sparks,	Nevada	560a
Ruby Valley,	Nevada	40a
South Fork & Odgers Ranch,	Nevada	90
Summit Lake,	Nevada	L
Walker River,	Nevada	440
Winnemucca,	Nevada	40
Yerington (Campbell Ranch) & colony,	Nevada	290
Yomba,	Nevada	40
NEW MEXICO		
Acoma,	Southern Pueblos	1,940
Alamo (Puertocito),	Navajo Area	950
Canoncito,	Navajo Area	1,160
Cochiti,	Southern Pueblos	430
Isleta,	Southern Pueblos	1,780
Jemez,	Southern Pueblos	1,450
Jicarilla,	Jicarilla	1,800
Laguna,	Southern Pueblos	2,460
Mescalero,	Mescalero	1,700
Nambe,	Northern Pueblos	170
Navajo: Total Navajo Area		(128,120)
New Mexico part, Navajo Area		50,070
Picuris,	Northern Pueblos	90
Pojoaque,	Northern Pueblos	60
Ramah,	Albuquerque Area	1,400
Sandia,	Southern Pueblos	200
San Felipe,	Southern Pueblos	1,350
San Ildefonso,	Northern Pueblos	230
San Juan,	Northern Pueblos	870
Santa Ana,	Southern Pueblos	380
Santa Clara,	Northern Pueblos	560
Santo Domingo,	Southern Pueblos	1,850
Taos,	Northern Pueblos	960
Tesuque,	Northern Pueblos	170
Zia,	Southern Pueblos	460
Zuni,	Zuni	4,950
NORTH CAROLINA		
Cherokee (Qualla Boundary)	Cherokee	4,820
NORTH DAKOTA		
Fort Berthold,	Fort Berthold	2,720
Fort Totten (Devils Lake)	Fort Totten	1,990
Turtle Mountain,	Turtle Mt.	7,380
(See also Standing Rock listed in South Dakota.)		
OKLAHOMA (Represents former reservation areas.)		
Absentee Shawnee,	Shawnee	760
Cheyenne-Arapho,	Concho	3,910
Cherokee,	Tahlequah	11,560
Chickasaw,	Ardmore	5,650
Choctaw,	Talihina	12,420
Creek,	Okmulgee	13,600

State and Reservation	BIA Agency	Indian Population
Eastern Shawnee, Miami (see Agcy T.)		
Fort Sill Apache (see Kiowa-Comanche-Apache)		
Iowa, Shawnee		80
Kaw, Pawnee (see Agcy T.)		
Kickapoo, Shawnee		520
Kiowa-Comanche-Apache and Ft. Sill Apache Anadarko		6,280
Miami Tribe, Miami (see Agcy T.)		
Miami Agency, Miami		12,100
Osage, Osage		3,190
Otoe-Missouri, Pawnee (see Agcy T.)		
Pawnee, Pawnee (see Agcy T.)		
Pawnee Agency, Pawnee		3,390
Ponca, Pawnee (see Agcy T.)		
Potawatomi, Shawnee		1,320
Quapaw, Miami (see Agcy T.)		
Sac & Fox, Shawnee		880
Seminole, Wewoka		7,370
Seneca- Gayuga, Miami (see Agcy T.)		
Tonkawa, Pawnee (see Agcy T.)		
Wichita, Anadarko		3,000
Other Indian Reservation not Shawnee		600
OREGON		
Burns-Paiute, Warm Springs		130
Celilo Village, Warm Springs		30a
Umatilla, Umatilla		970
Warm Springs, Warm Springs		1,640
SOUTH DAKOTA		
Cheyenne River, Cheyenne River		4,230
Crow Creek, Pierre		1,180
Flandreau, Flandreau		270
Lower Brule, Pierre		620
Pine Ridge, Pine Ridge		11,500
Rosebud, Rosebud		7,400
Sisseton, Sisseton		2,120
Standing Rock, Standing Rock		4,890h
Yankton, Yankton		930
UTAH		
Navajo: Total Navajo Area		(128,120)
Utah part, Navajo		4,400
Skull Valley, Uintah & Ouray		40
Uintah & Ouray, Uintah & Ouray		1,300
Washakie, Fort Hall		L
(See also Goshute listed in Nevada and Ute Mountain in Colorado.)		
WASHINGTON		
Chehalis, Western Wash.		190a
Colville, Colville		2,730
Hoh, Western Washington		40
Kalispell, Northern Washington		130
Lower Elwah, Western Wash.		130a
Lummi, Western Washington		1,380
Makah, Western Washington		570
Muckleshoot, Western Wash.		340a
Nisqually, Western Washington		190a
Nooksak, Western Washington		260a
Port Gamble, Western Wash.		120a
Port Madison, Western Wash.		190a
Puyallup, Western Washington		170
Quileute, Western Washington		300
Quinault, Western Washington		1,000
Shoalwater, Western Washington		20
Skokomish, Western Washington		220
Spokane, Spokane		530
Squaxon Island, Western Wash.		130
Swinomish, Western Washington		370
Tulalip, Western Washington		630
Yakima, Yakima		7,480
WISCONSIN		
Bad River, Great Lakes		480
Lac Courte Oreilles, Great Lakes		820
Lac du Flambeau, Great Lakes		960
Mole Lake, Great Lakes		130
Oneida, Great Lakes		2,030
Potawatomi, Great Lakes		180
Red Cliff, Great Lakes		400
St. Croix, Great Lakes		340
Stockbridge-Munsee, Great Lakes		500
Winnebago, Great Lakes		1,380i
WYOMING		
Wind River, Wind River		4,280

L means less than 10.
a 1970 data.
b 3% in Arizona.
c 21% in Utah.
Agcy T. means agency total.
d 37% in Nebraska.
e 47% in Nebraska.
f 25% in Idaho.
g 39% in Utah.
h 47% in North Dakota.
i 4% in Minnesota.

APPENDIX B

CECILE F. POOLE, United States Attorney
FRANCIS B. BOONE, Assistant United States Attorney
16th Floor Federal Bldg.— Box 36055—450 Golden Gate Avenue
San Francisco, California 94102 Tel. (415) 556-3215
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED TRIBES OF MENDOCINO COUNTY, et al., Plaintiffs, vs. THE BUREAU OF INDIAN AFFAIRS, et al., Defendants.	Civil No. 52326 SUPPLEMENTARY AFFIDAVIT OF WESLEY L. BARKER SUPPORTING MOTION TO DISMISS

Defendants file herewith a supplement to that affidavit dated December 31, 1969, and filed on January 5, 1970. Said Supplementary Affidavit is in response to

Plaintiffs' Third Memorandum of Points and Authorities dated January 8, 1970, as well as Plaintiffs' Supplementary Memorandum of Points and Authorities filed January 5, 1970.

State of California }
} ss.
County of Sacramento }

BEFORE the undersigned authority personally appeared Wesley L. Barker, who acts in the official capacity as stated in his affidavit of December 31, 1969; and who under oath deposes and says to the best of his information knowledge and belief:

1. There has been no instance where a California Indian, otherwise eligible, was denied available federal boarding school or scholarship assistance by the Sacramento Area Office for failure to meet the "on or near" criteria in the regulations. The Sacramento Area Office has jurisdiction throughout the State of California with the exception of the Colorado River Indian tribes.

2. It is the policy of the Sacramento Area Office to consider that every California Indian lives "near" a reservation (unless he actually lives on a reservation) for the purposes of administering the aforesaid programs.

Signed this 12th day of January, 1970.

SEAL

Wesley L. Barker
Area Community Services Officer
Sacramento Area Office
Bureau of Indian Affairs
U. S. Department of the Interior

Subscribed and sworn to before me this 12th day of January, 1970.

Notary Public in and for the County
of Sacramento, State of California
My Commission expires March 2, 1971.

APPENDIX C

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Memorandum January 16, 1970

To: Commissioner, Bureau of Indian Affairs
From: Assistant Secretary—Public Land Management
Subject: Adherence to our long-standing policy of not providing special Bureau of Indian Affairs services to off-reservation Indians.

It is a long-standing general policy of the Bureau of Indian Affairs and the Congress that the Bureau's special Federal services are to be provided only to the reservation Indians. The bases for these special services rest in treaties with tribes and upon the tax-exempt land on which the Indians reside, and the inability of the local and state governments to provide the usual services in Indian Country.

There are tremendous numbers of people of Indian ancestry living in the eastern part of the United States, as well elsewhere in urban areas, who are not affiliated with any tribe and have long been a part of the community in which they live and work. They are entitled to and should receive the same services from their local, state and Federal agencies that the other citizens of the community receive.

It is appropriate for the Bureau of Indian Affairs to assume the role of working with other Federal agencies, such as NCIO, OEO, HEW, Labor Department, etc., as well as state and local agencies and private organizations, to assure that their services are made available in a meaningful way to meet the needs of off-reservation Indian people. The Bureau of Indian Affairs, however, must be very careful not to assume additional responsibilities and begin providing its special services to off-reservation Indians.

I am sure you realize the consequences that would flow from such a change in policy and responsibility. The Bureau of Indian Affairs has an urgent and challenging job to meet the needs of the tribal Indians of the reservations. This is no time to be diverting our attention and limited funds from our basic responsibility. Will you please be very careful in administering the programs of the Bureau of Indian Affairs to be sure to adhere strictly to this principle. There will, of course, be need for flexibility and sound judgment exercised by the Superintendents in individual hardship, transitional or borderline cases, but they must be handled as individual exceptions and not be allowed to compromise our basic principle as to the clientele to be served by the Bureau of Indian Affairs.

(Sgd) Harrison Loesch
Harrison Loesch

APPENDIX D

BUREAU OF INDIAN AFFAIRS
State of Oklahoma
Appropriation and Activity

	Actual F.Y. 1970	*Estimate F.Y. 1971*	*Estimate F.Y. 1972*
EDUCATION AND WELFARE SERVICES:			
Educational assistance, facilities and services	8,726,466	10,831,073	14,098,640
Adult education	167,116	244,749	244,749
Welfare and guidance services	2,337,223	2,616,757	3,073,868
Relocation and adult vocational training	2,243,483	3,119,910	3,180,500
Maintaining law and order	612	—	—
Total	13,474,900	16,812,489	20,597,757
RESOURCES MANAGEMENT:			
Forest and range lands	4,352	2,000	2,000
Fire suppression	—	—	—
Agricultural and industrial assistance	888,547	1,005,500	1,005,500
Soil and moisture conervation	1,274,870	1,172,320	1,172,320
Maintenance of roads	193,178	189,000	239,000
Development of Indian arts and crafts	36,660	39,000	39,000
Management of Indian trust property	1,140,447	1,192,820	1,192,820
Repair and maintenance of buildings and utilities	1,026,355	1,254,550	1,385,700
Operation, repair and maintenance of Indian irrigation systems	—	—	—
Indian business development fund	—	345,900	345,900
Total	4,559,409	5,201,090	5,382,240
CONSTRUCTION:			
Buildings and utilities	158,828	834,000	1,196,400
Irrigation systems	—	—	—
Total	158,828	834,000	1,196,400
ROAD CONSTRUCTION			
Federal-Aid Highway roads	832,414	1,013,000	1,300,000
GENERAL ADMINISTRATIVE EXPENSES:	422,877	451,000	451,000
GRAND TOTAL	19,448,428	24,311,579	28,927,397

APPENDIX E

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

Memorandum
To: Commissioner of Indian Affairs
From: Assistant Solicitor, Division of Indian Affairs
Subject: Scope of the Snyder Act of November 2, 1921, 42 Stat. 208, 25 U.S.C. § 13

Your office has informally requested our views on the question of whether the Snyder Act restricts the expenditure of appropriated funds for the benefit of Indians of federally recognized tribes living on reservations established by the United States. Implicit in this question are the collateral questions of whether such funds may be used for the benefit of (1) Indian members of federally recognized tribes not living on reservations established by the United States, (2) persons of Indian descent who are eligible by ancestry and blood quantum for membership in a federally recognized tribe but are not members, (3) persons of Indian descent who are not members of nor eligible for membership in a federally recognized tribe but who are members of or eligible for membership in a tribe recognized by a state or for whom a state has established a reservation, or (4), various combinations of these situations.

We limit our views to the basic inquiry ,and except from consideration those special statutes authorizing particular programs for the benefit of specified categories, such as that authorizing loans for tuition and expenses in vocational and trade schools (Section 11 of the Act of June 18, 1934, 48 Stat. 986, 25 U.S.C. § 471), and that providing for adult vocational training (Act of August 2, 1956), 70 Stat. 986, as amended, 25 U.S.C. § 309). Moreover, in considering the scope of the Snyder Act, it is necessary to keep in mind such overriding limitations as that

found in the Act of May 25, 1918, 40 Stat. 564, 25 U.S.C. § 297, prohibiting the use of appropriated funds for the education of "children of less than one-fourth Indian blood whose parents are citizens of the United States and of the State wherein they live and where there are adequate free school facilities provided."

The Snyder Act provides that your Bureau, under the supervision of the Secretary,

> shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of *Indians throughout the United States* for the following purposes: (Emphasis added)

and then lists nine extremely broad classifications of programs. On its face, the underscored language is abundatantly clear and requires no interpretation. Literally, it authorizes the expenditure of funds for purposes within the named program categories for the benefit of any and all Indians, of whatever degree, whether or not members of federally recognized tribes, and without regard to residence so long as they are within the United States. Parenthetically, we suggest that Indians who are foreign nationals would not be eligible for such benefits, but on a principle not related to the literal language of the statute. With language so unequivocal, it is subject to the general rule of law that plain and unambiguous language will be followed and there is no need to resort to extraneous material as an aid to construction. 50 Am. Jur., *Statutes*, §225, and cases there cited.

This is not to say, however, that we can advise you to use the Snyder Act as *carte blanche* authority to extend your Bureau's programs in a grand manner. It is clear from the legislative history of the act that it was intended only to confirm in permanent legislation the use of funds for purposes which had earlier been authorized only in annual appropriation acts.

Prior to its enactment, there had been no specific law authorizing many of the expenditures for programs which the Bureau of Indian Affairs had developed since 1832 for the benefit of Indians. Instead, each annual appropriation act contained substantive authority for the expenditure of the funds for specified purposes. When the Indian appropriation bill for the fiscal year 1922 was under consideration in the House of Representatives, parliamentary points of order were made and sustained because of the fact that there was no basic law authorizing such appropriations. Although it seems that the items stricken on points of order were, as in prior years, restored by the Senate, survived the conference committee, and ultimately enacted, Representative Snyder introduced the bill which became the act and which, according to the report of the House Committee on Indian Affairs (H.R. Rep. No. 275, 67 Cong., 1st Sess. (June 20, 1921)), "will make in order these appropriations which have hitherto been subject to a point of order."

In the debate on the floor of the House, Representative Blanton insisted (61 Cong. Rec. 4668, August 4, 1921) that the bill,

> if passed, will constitute specific authority and specific law authorizing the Committee on Appropriations to place in future Indian appropriation bills any and every item of appropriation they have seen fit to put in absolutely without any limit or restriction whatever.
>
> To paraphrase the position of the opponents of the bill, it would place in the hands of the Indian subcommittee of the House Appropriations Committee the power to determine how much and for what purposes Federal appropriated Indian program funds were to be spent. The substantive committee, which under House rules prior to 1921 had both legislative and appropriating jurisdiction, would be left without power to prevent what the Appropriations Committee decided it wanted done.
>
> On the other hand, the advocates of the bill in the House insisted that it was a simple proposal which would merely regularize the appropriation process. Some of the more significant remarks in the debate in the House were these:
>
> Mr. CARTER * * *. This bill does not undertake the enlargement of a single activity which is not now in operation by the Indian Bureau. (61 Cong. Rec., *supra*, 4671).
>
> * * * *
>
> It does not start a single additional agency in the Bureau of Indian Affairs, it does not enlarge its activities, and does not create any new activities. (61 Cong. Rec., supra, 4672).
>
> * * * *
>
> M. DOWELL. Then, as I understand the gentleman, this bill does

not authorize anything not already included in the Indian appropriation act.

Mr. SNYDER. It does not authorize the bureau to do a single, additional thing.

Mr. DOWELL. It does not authorize anything that is not appropriated for under the present law.

Mr. SNYDER. Absolutely not. It includes only those things that have become integral parts of the service.

Mr. DOWELL. And that are now a part of the service.

Mr. SNYDER. Yes * * * .

(61 Cong. Rec., *supra*, 4684).

Thus, although the language of the Snyder Act will, in our opinion, support an application as broad as its language, we suggest that any proposed extensions of existing Bureau of Indian Affairs programs in either lateral or horizontal directions be examined for conformity with other statutory limitations, and that they be not only supported by the necessary appropriations, but that they be undertaken only with the knowledge of the appropriate committees of the Congress.

CHARLES M. SOLLER